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Beneficiaries under the New Motor Insurance Law.

By

M.N.Srinivasan, B.Sc., (Hons.) LL.B., Advocate, Bangalore.

The provisions of the Motor Vehicles Act, 1939 and in particular those of Chapter VIII relating to the Insurance of Motor Vehicles have been quite familiar to the members of the legal world connected with the dispensation of justice since over fifty years. During these years the provisions of this Chapter have suffered major amendments two or three times mainly on the lines of the changes in the English Road Traffic Acts. This was quite natural as the original provisions of Chapter VIII of 1939 Act itself was on the basis of English Act of 1930.

This Act has again been extensively overhauled by the 1988 consolidating and amending Act. Here again the changes in the provisions of the Chapter relating to Insurance of Motor Vehicles has been to some extent on the lines of the changes made in the English Act of 1972. All the while this process of adjusting our Laws from time to time to the changes in the corresponding English Act has been partly with a view to get the benefit of the interpretation of those provisions by the superior English Courts.

Confining our attention to Sec.95 of the 1939 Act, which lays down the requirements of policies to satisfy the provisions of Chapter VIII and the corresponding provision namely Sec.147 of the 1988 Act which is word for word the same as that of the old Act except for the deletion of one proviso to the Section, it is interesting to examine whether the provisions of the section could at all have been drafted more elegantly. At any rate it appears from what follows that there is avoidable overlapping and consequent want of clarity.

Sec.147(1)(b)(i) is the same as Sec.95(1)(b)(1) of the old Act and refers to the requirement that the policy should cover the risk of death or injury *"to any person....* of a Third party caused by....the use of *the vehicle.....* "Third party has been construed as any person other than the Insurer and the Insured, who are the two parties to the Policy [Viscount Simon L.C. in *Digby v. General Accident, (1942) 2 All E.R. 319 (H.L.).*] Here the words 'Person' and 'Vehicle' are both unqualified.

Hence this clause is comprehensive enough to *include* risks caused by the use of any kind of vehicle that is whether it is a private motor vehicle or a public service vehicle which is defined as one used for the carriage of passengers for hire or reward etc. It is also comprehensive enough to include the risk to 'any person' other than the Insurer and the Insured that is whether he is a passenger in the vehicle or not and whether he is a gratuitous passenger or one being carried for hire or reward or whether he is an employee of the Insured or not. It may therefore be safely said that apart from liabilities under the Workmen's Compensation Act, 1923, the amplitude of this clause (1)(b)(i) of Sec.147 by itself is quite comprehensive to cover the Act liability in respect of all persons other than the Insurer and the Insured caused by or arising out of the use of all kinds of motor vehicles for which the Act intended to make provision.

If what is stated above is correct we will have to examine in what way the second clause of Sec.147(1)(b) adds to or takes away from what clause (i) of Sec.147(1)(b) comprehensively provides. In the first place it must be pointed out that the opening words of clause (ii) "against the death of or bodily injury to" made no sense as no policy of Insurance can be taken against the death or injury but only against any liability that may be incurred in respect of the death of etc.

Now clause (ii) of Sec.147(1)(b) states that the policy must cover the risk of injury to any passenger of a public service vehicle caused by the use of the vehicle. This it is already seen above is covered under clause (i) itself, because clause (i) covers the case of injury of all persons by the use of all kinds of vehicles. Hence this clause (ii) is redundant, unless it can be held that 'vehicle in clause (i) does not include public service vehicles. This cannot be. Again clause (ii) is silent about the case of the public service vehicle causing death of or injury to a third party who is not a passenger, that is, not being carried in the vehicle. For this again recourse is to be had to clause (i) as pointed out above. Thus in both ways clause (ii) is ill conceived and serves no purpose.

Proviso (ii) to Sec.95(1) of the old Act stated that the liability to passengers also must be covered only in the case of vehicles in which passengers are carried for hire or reward or by reason of or in pursuance of the contract of employment. In view of this Proviso it was held in *Pushpabai v. Ranjit G and P Company, A.I.R. 1977 S.C. 1735,* that gratuitous passengers in private cars are not required to be covered for death or injury. Now that this Proviso (ii) is omitted altogether in the 1988 Act it follows that passengers in private cars as well as in public service vehicles are also to be covered whether they are gratuitous or fare paying passengers. It must be pointed out here that the question whether ticketless passengers in buses are entitled to be covered or not was left open by the Supreme Court in *MPSRTC v. Zenabai, A.I.R. 1977 S.C. 2206,* under the 1939 Act.

If there is any ambiguity in the legislation the "question has to be resolved having regard to the underlying purpose of the provisions of Chapter 8 (now Chapter XI). That is a sensitive process which has to accommodate the claims of society as reflected in the purpose". Please see *Motor Owners Insurance Co. v. J.K.Modi, A.I.R. 1981 S.C. 2059.*

Such defective drafting of Legislation when pointed out should be examined early and corrections suggested by the Executive or the Law Commission in order to avoid wasteful litigation. A recent P.T.I. report of 12.11.1990 shows that Motor accidents which caused 5,106 deaths and 37,731 injuries in 1960 were responsible in 1988 for 2,55,278 accidents in which there were 49,218 deaths and 2,06,060 severe injuries.

It, therefore, appears quite in order to interpret the deletion in the 1988 Act of Proviso (ii) to Sec.95(i) of the old Act as an indication that the purpose of the legislation is that all passengers being carried in private cars or in public service vehicles whether they are gratuitous or fare paying should be covered by compulsory Insurance policies required under Chapter XI of the 1988 Motor Vehicles Act and paid just compensation for the suffering caused to them.

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A comment on (1990)1 M.L.J. 67.

By

Mr.S.Ramakrishnan, B.Sc. B.L., Advocate, Srivaikuntam.

In the abovesaid decision some important points came to the consideration of the High Court. Whether the legal representatives can claim the benefit of Act 13 of 1980? Whether the plea can be raised in the execution proceeding? Whether the decision rendered against the debtor will prevail against the legal representatives? Whether a certificate from the Tahsildar is necessary?

The learned Judge Abdul Hadi held that the legal representatives are entitled to the benefit of Act 13 of 1980. There is no doubt about it. But on the questions whether the plea can be raised in the execution proceeding and whether it can be raised when a judgment had been already given in the suit, and whether a certificate from the Tahsildar is necessary the opinion of the learned Judge seems to be incorrect.

The learned Judge has relied on the ruling *(1970)2 S.C.J. 348.* According to the Supreme Court, the legal representative can raise the defence which the original debtor could if he had been sued, have set up. So it implies that if the original debtor could not have set up a defence, the legal representatives cannot raise that defendant. Moreover the decision does not deal with the questions whether legal representatives can set up a defence, which had been held against the principal debtor? The decision is also silent on the point whether a point which had not been raised by the principal debtor, can be raised by the legal representatives.

In this connection it is pertinent to refer to Sec.11, C.P.C. Sec.11 applies to parties to suit and to person claiming through them. So legal representatives are persons claiming through the principal debtor. Explanation IV says "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit "Explanation VII reads thus "The provision of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or form a suit shall be construed as references respectively to a proceeding for the execution of the decree, question arising in such proceeding for the execution of that decree". So it is very clear that on a point if a decision is already given or if a defence which had not been taken, it cannot be taken in execution proceeding. There is a direct decision on this point. *(1979)2 M.L.J. (N.R.C.) 7.* There it is held that if the debt relief is not raised in the suit it cannot be raised in the execution proceeding. When the original debtor cannot himself raise the plea in the execution proceeding his legal representatives cannot raise the plea in the execution proceeding. *(1970)2 S.C.J. 348,* implies this. So merely because *(1989)1 L.W. 253,* holds that legal representatives are entitled to the benefit of Act 13 of 1980, it cannot be stated that when the original debtor is refused the relief his legal representatives can raise the plea in the execution proceeding. Only if before the Act came into force the decree had been passed, the defence of debt relief can be raised in the execution proceeding.

So it is very clear whenever debt relief has been raised in the suit the legal representatives cannot raise the plea again. In the case under discussion, relief has been refused to the original debtor. So the legal representatives cannot get benefit under Act 13 of 1980.

One other question which remains is whether Tahsildar's certificate is necessary? The learned Judge relied upon *(1981)2M.L.J. 1* and held that a certificate from the Tahsildar is not necessary *(1981)2 M.L.J.* says once a decree has been passed, it cannot be re-opened by the Tahsildar. That is correct. There are two certificates mentioned in Act 13 of 1980. One is a discharge certificate under Sec.6. Another is a certificate for valuation of the debtors property under Sec.3 of Act. *Vide:* Sec.3 (VII) Explanation. This view is fortified by the decision in *1988)2 M.L.J. 363.* So to decide whether a person is entitled to the benefit under Act 13 of 1980 whether at the stage of the suit or at the stage of the execution proceeding a certificate for the market value of the debtors property is essential.

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Awarding of Costs in Civil Proceedings
Norms and Statutory Provisions Not Followed
Rule of Law must Inspire All Courts.

By

Shri T.A.Varadarajan, M.A., B.L., D.P.P.A.
Advocate,
Madurai-625 001. (Tamil Nadu)

It is axiomatic that litigation in Courts has become a very costly, if not a Prohibitive, affair nowadays. The suitor from the village or town, has to, satisfy and feed several agencies enormously for several years. He, or she, or institutions expect and await eagerly that they will get back their expenses atleast in a small measure, as soon as they succeed in their cases.

What does it happen really at the end of it all? Alas! The verdict is given mostly either as,

(a) *No Costs,*

Or, as

(b) *In the Circumstances. No Costs, for the successful party in the Case.*

The above kind of dispensation disappointing the successful party, is found reflected in most of the judgments of the entire hierarchy of Courts, *viz* District Munsif Court upto the Apex Court. This has evoked anguish, consternation and criticism among the abovesaid large circle of successful but unfortunate litigants;

Secs.35,35A and 35B of C.P.C., provide for awarding of costs. I am confining my discussion here to Sec.35 alone.

Sec.35 rules that costs must follow the event, and if the successful party is deprived of their costs, the Court decreeing so must give its reasons in writing.

As set out above, Courts often observe the above rule in its breach. They deny costs to the winners, without giving any reasons at all and, if at all they do, they adopt the Delphic Oracle style of exclaiming *"In the Circumstances, No Costs".*

The above kind of cryptic disposal, without any speaking order in justification of it by lower courts, *viz.* Munsif Court, Sub Courts and District Court has come in for comment at the hands of the High Courts and Supreme Court. They have laid down that the lower Courts must disclose acceptable or convincing reasons, for depriving the winning party of the costs justly due to him and the apology of words "In the circumstances. No costs", is not proper.

But, the pathos of it, is that these very topmost Courts themselves in their turn are guilty of this hurtful exercise of denying costs to the succeeding party, by using the same Censured Phraseology of "In the Circumstances. No costs".

It is needless to iterate that the awarding of costs by Courts, is only *in their judicial discretion* and the exercise of such a non-capricious attitude must get exhibited in their judgments. *The Rule of Law which pervades and permeates throughout this land,* from topmost personage to the lowest of the lowest, *viz.* The President of India down to the pavement dweller, *must also govern and inspire the High Courts and the Supreme Court, in their assortment and apportionment of Costs, among the parties before them.*

The successful party should not get damnified in its getting the Costs justly due to them. *Giving away of the Costs fairly due to them by the Courts in favour of the party who lost in the game, as a sop or consolation to satisfy the susceptibilities of the learned counsel appearing on the other side (for the party worsted in the cause) is not at all justified and has to be strongly deprecated. Justice must not only be done, but must also appear to be done even at the highest level.*

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A caution regarding Sec.149, Motor Vehicles Act, 1988.

By

Shri M.N.Srinivasan, Advocate, Bangalore-3.

According to Sec.94, Motor Vehicles Act, 1939, the user of a motor vehicle in a public place must have a policy which satisfies the requirements of Chapter VIII of the Act. The idea in making such a policy compulsory is that if any such liability is incurred by the insured it can be discharged by the insurer as laid down in Sec.96 so that the injured third party will not go without getting the compensation awarded to him.

However, it happens that the indemnity given by the policy will be 'subject to the terms, exceptions and conditions contained' therein. In case of breach of any of these conditions the insurer will not be liable to provide the stipulated indemnity to the insured. In the result the third party will have to recover the amount decreed in his favour from the insured himself, who very often will be unable to satisfy the decree, depending on his financial ability.

In order to overcome this difficulty the Act provided that once such a policy is issued, the insurer cannot escape from his duty to satisfy the judgment obtained by the third party against the insured person even if certain restrictive conditions contained in the policy are contravened by the insured-see also *New Asiatic Insurance Co. v. Pessumal, 1964 S.C. 1736* and *B.I.G. Insurance Co. v. Itbar Singh, 1959 S.C. 1331.*

If the policy contains any of the conditions mentioned in Sec.96(2)(b) and there is a breach of such a condition by the insured, then the insurer is not liable (1) to indemnify the insured or (2) to satisfy the judgment obtained by the third party against the insured. If the policy contains any restrictive conditions other than those contained in Sec.96(2)(b) and such a condition is contravened by the insured, then the insurer is not liable to indemnify the insured, but is still bound to satisfy the judgment obtained by the third party against the insured - Sec.96(3).

Sec.96(2) referred to another ground by which the insurer can defend the action by the third party against the insured, namely that the policy is void on the ground that it was obtained by non-disclosure or misrepresentation of a material fact by the insured, in other words, that there is no valid policy of insurance at all which can bind the insurer to satisfy the judgment against the insured.

The above was the position in regard to policies taken to comply with the requirements of Chapter VIII. These provisions were fairly satisfactory and did not need any violent modification or replacement nor was there any agitation for change. Hence it raises a doubt whether the change noticed in the corresponding provision of the 1988 Act namely in Sec.149 is after mature consideration of Parliament or otherwise.

The position in this respect under the old Act was as stated above according to Sec.96(3). That under the new Act is in Sec.149(4) which is word for word the same as that of the old Sec.96(3). Yet the two differ vastly in effect because clause (2)(b) of Sec.96 is not the same as clause (2)(b) of Sec.149. Sec.149(4) refers to restrictions of the insurance by reference to 'any conditions other than those in clause (2)(b) of the section'. But this clause refers to the ground that the policy is void and not to any conditions which restrict the insurance. Hence it is reasonable to conclude that there is some mistake somewhere, whether it is during the enactment in Parliament or in the publication of the Act. In any case it is for the concerned authorities to look into the matter and rectify the mistake at a very early date as the Judiciary cannot do this job.

This much can be said that if there should be no change in the position under the new Act also, then the reference in Sec.149(4) should be to clause (2)(a) instead of to clause (2)(b), because what was clause (2)(b) in the old Act has been numbered as Clause (2)(a) in the New Act.

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A note about an observation in

Canara Bank v. Vijaya Bank, (1992)1 M.L.J. 636

By

S.R.Veeraraghavan, Advocate, Tiruvannamalai.

A Division Bench of our High Court in the above matter, very recently observed:

19. "We also find that in many cases, the depositions recorded by the subordinate courts are not legible. In fact in the present case, it was very difficult for both the counsel as well as for ourselves to decipher most of the passages recorded by the Court below. The evidence recorded is not a lengthy one and yet it has not been recorded legibly. Greater care must be taken by the Subordinate Courts in writing out the depositions. It is needless to say that justice should not fail on the mere grounds that what has been recorded as evidence is not legible". [at page 643]

In this regard O.18, Rule 5, C.P.C. as amended by the Central Act 104 of 1976 may be looked into:

O.18, Rule 5: *How evidence shall be taken in Appealable cases:* In cases in which an appeal is allowed, the evidence of each witness shall be,-

(a) taken down in the language of the court,-

(i) in writing by or in the presence and under the personal direction and superintendence of, the Judge, or

(ii) from the dictation of the Judge directly on a typewriter; or

(b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge.

So, the Judge can take evidence when the witness is being examined in public Court by dictating the deposition to the typist and the latter can directly take the deposition on his typewriter as dictated by the Judge. When the judge so dictates, the advocates also can take them down and they can make use of it at the time of arguments. Further, any defects in such dictation can be pointed out and rectified then and there.

Another advantage is this. At the time of taking down of the evidence, the typist can be authorised to make carbon copies of the depositions. This carbon copy made of mechanical process and in the public court simultaneously with the original, can be supplied to the concerned parties with the seal and the signature of the Court. This can be used as an authenticated certified copy of the deposition. The advocates would have gladly deposited the necessary sum as copying charges even before the trial began. If they had to pay additional charges, they would pay that amount and get the copies. This will avoid unnecessary delay in getting certified copies of the depositions.

This practice of the typing down of the deposition in public court to the dictation of the Judge is being adopted when a sessions trial is conducted by the Additional Sessions Judge (Sub-Judge).

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A submission on the judgment in

Thirumayaee and another v. J.P.Maraswamy, (1992)1 L.W. 473.

By

M.R.Pradeep Kumar, M.L., (Formerly Junior Professor of Law College, Madurai), Advocate, Krishnagiri.

In this case, the Madras High Court had an occasion to consider the right of an assignee of a decree to file an application for the execution of the decree in the light of O.21, Rule 16 and Sec.146 of the Civil Procedure Code, 1908. In the civil revision petition before the High Court, the right of the 1st respondent, in whose favour an agreement for sale of certain property was entered into, to file his application for the execution of the decree, obtained by an intending seller, was questioned. His Lordship Venkataswami, J. after considering the decisions of the Madras High Court and the Supreme Court, held, that the 1st respondent in that case has every right, in view of Sec.146 of the Civil Procedure Code of 1908, to file his application for the execution of the decree.

The above verdict of His Lordship Venkataswami, J. has given rise to certain impressions which are as follows. As per O.21, Rule 16, where a decree is transferred by assignment in writing or by

operation of law, the transferee may apply for execution of the decree to the Court, which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application was made by such decree-holder. By virtue of the explanation added to the said rule by the Amendment Act of 1976 that nothing in this rule shall affect the provisions of Sec.146, and a transferee of rights in the property, which is the subject matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by the rule. Thus in order that a person should be able to apply for the execution of a decree, such person should either be a decree holder, or he must have an assignment in writing of the decree in his favour or he must have acquired that right by operation of law. The explanation added to O.21, Rule 16 by the Amendment Act of 1976, confers a right on the 'transferee of the rights' in the property, which is the subject matter of the suit, to apply for the execution of the decree even without any separate assignment in writing.

In the instant case, on behalf of the 1st respondent several decisions of the Madras High Court and the Supreme Court were cited, in order to clothe him with the right of making his application for the execution of the decree.

One of such decisions of the Madras High Court is *Karuppa Gounder v. Chinna Angappa Gounder, (1971) 1 M.L.J. 252: 84 L.W. 143*. In this case, His Lordship Sadasivam, J. had to consider the right of the respondent therein, (in a C.R.P.) who happened to be a purchaser of the share in the properties, that had fallen to the first defendant in the compromise. Though the respondent in that case, did not get any assignment of the decree, it was held, he could enforce the decree, in view of Sec.146 of the Civil Procedure Code.

In *Jugalkishore Saraf v. Raw Cotton Co. Ltd., A.I.R. 1955 S.C. 376*, Sec.146 of the C.P.C. came up for consideration by the Supreme Court. In that case, certain book debts were transferred, during the pendency of the suit. Though the transferees, of the debts did not apply to be joined as parties, in the pending suit, they were held entitled to apply for execution of the decree, in view of the fact that they derived their title to the debt by transfer, and they were regarded as persons claiming under the transfer. Even in another Supreme Court case, *A.I.R. 1979 S.C. 1066*, the land, the subject matter of the decree was sold to appellants, and they became the owners of the subject matter of the decree. It was held, they had every right to maintain the application for execution of the decree, under Sec.146, C.P.C., as persons, claiming under the decree-holder.

Again in *Bhoop v. Matadin, A.I.R. 1991 S.C. 373*, the scope of the Sec.146, C.P.C. came to be considered by the Apex Court, in respect of a transferee of a right of pre-emption. It was held, that though the right of a pre-emptor is purely a personal right, and the same cannot be transferred, to a third party, once the title to the property had become vested in the decree holder, and if he transfers his interest in the pre-emptional land, the transferee can substitute his name in the place of decree holder, and continue the execution proceedings.

Now, in the light of the above pronouncements of the Madras High Court and the Supreme Court I would like to make my submissions in the instant case, with regard to the right of the 1st respondent in that case, to make his application for execution of the decree, that had been obtained by his intending vendor. His Lordship Venkataswami, J. has held, that the intending vendor has parted with his right and interest in the land in favour of the 1st respondent. What was entered into, in favour of the 1st respondent is only an agreement for sale. As per Sec.54 of the Transfer of Property Act, 1882, that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties, and it does not, of itself create any interest in or charge on such property. In view of the said section, the Supreme Court in *Rambaran v. Ram Mohit, 1967 S.C.R. 293*, has held settling a conflict of decisions that a contract for sale does not create any interest in land. Therefore, the intending purchaser does not acquire any interest in the property, merely because an agreement for sale has been entered into, in his favour. Furthermore, it is respectfully submitted, that the 1st respondents right to demand or have the sale deed executed in his name, would accrue, only when the sale deed in favour of his vendor would be executed. All the cases, cited before His Lordship, are distinguishable from the instant case, for the obvious reason, that the applicants in those cases had become the transferees or owners of the subject matter of the decree within the meaning of Sec.146, C.P.C. and therefore, they were held to be persons claiming under the decree holders. In the instant case, the applicant for the execution of the decree, has, it is respectfully submitted, not acquired any right or interest in the land, intended to be sold under the agreement for sale, and he cannot be given the status of a person claiming under the decree-holder, merely, because of the agreement for sale, coupled with possession and the consideration paid in full for the land.

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Rationale and Relevance of TADA

By

C.V.Narasimhan, I.P.S.,
Director General of Police (Retd.)

Madras City recently witnessed severe vandalism at a State Transport bus depot in the wake of a procession and meeting organised by a political party to voice its protest against *TADA* (The Terrorist and Disruptive Activities Prevention Act, 1987). The few other opposition parties have also started orchestrating a campaign against the use of *TADA* by the State police to deal with organised anti-social and anti-national militancy. Newspapers also refer to persons arrested under *TADA* as detenus, giving the impression that *TADA* provides for preventive detention and could therefore be invoked on even slender evidence which may not be admissible in a regular criminal trial. Such a sustained campaign against *TADA* may gather further strength unless it is countered by a well informed public who should see *TADA* in its proper perspective and accept its relevance and utility in our present situation. This article is aimed at providing this perspective.

TADA is *not* an Act for preventive detention. It deals with procedures for regular trial and punishment of certain new offences defined in the Act. Conventional crimes like murder, dacoity, robbery, kidnapping, abduction, assault and the like are precisely defined in the Indian Penal Code which is the basic Criminal Law of the land. The normal procedures for investigation, trial and punishment of these crimes are set out in the Criminal Procedure Code and the Evidence Act. These statutes were all enacted nearly hundred years ago. Fast changing societies all over the world are now witnessing new forms of deviant behaviour coupled with increasing violence, aided by firearms and explosives Terrorism, now perceived as a world wide phenomenon, has been with us for quite some time. Aggressive and militant politics are now part of our public life. Militancy is no longer the aberrant behaviour of a few individuals only but is well organised and directed by ruthless group leaders with political and other related objectives prejudicial to national unity and integrity. The finesse of their operations makes it difficult to bring their activities squrely within the ambit of the outmoded definitions evolved in the I.P.C., specially the activities of abettors and instigators behind the scene. It is in this context that *TADA* was enacted in 1987 defining new offences of 'terrorist act' and 'disruptive activity'. The term 'abetment' was also enlarged to cover the rendering of financial and other assistance to terrorists. Such additions to our Statute book are nothing new. When the evil of dowry reached menacing proportions with several young brides becoming victims of extreme cruelty at the hands of their husbands and their people, a new section was added to the I.P.C. in 1983 as Sec.498-A defining such acts of cruelty in a very wide form and providing severe punishment for them. When the atrocities on scheduled castes and tribes took new forms after the enactment of Protection of Civil Rights Act in 1955, the Central Government brought in new legislation in 1989 in the form of the Scheduled Castes and the Scheduled Tribes Prevention of Atrocities Act, which have a wider definition for the term 'atrocities' and made it severely punishable. That Act also provides for Special Courts as *TADA* does. Provisions for the forfeiture of property of convicted persons are the same in both the Acts. Presumption of certain facts on the basis of certain types of evidence in also spelt out on similar lines in *TADA* as in several other Acts relating to economic offences.

The atmosphere of intimidation and terror created by militant extremists makes it difficult to record evidence in the normal process. Witnesses require adequate safeguard against ruthless reprisals from the supporters of the accused persons. That is why *TADA* provides for in camera trial. This concept

is also not new. Sec.327 of the Crl.P.C. was amended in 1983 to provide for such in camera trial for the offence of rape.

The charge that *TADA* can be used to harass political opponents cannot really hold. The scope for misuse of *TADA* is just the same as it is in regard to any other law in the present system where the police is under the total executive control of the government which in effect means the ruling party. An unholy tie up between the scruple-free politicians and the sycophantic and servile elements in the criminal justice system, of which the police is only a part, can always lead to abuse of legal processes. But this does not mean that the law itself has the inherent elements for calculated misuse. For the present it should be noted that all actions taken under *TADA* are subject to judicial scrutiny at every stage, just like any other crime investigated by the police. If the material against any *TADA* accused is flimsy, it is bound to show up in court. It is before the court that the affected party must fight his battle and not in the streets through meetings and processions. The Madras High Court has already given a judgment that in exercise of its superintending powers under Art.227 it can, in certain circumstances, intervene and modify an order passed by the Designated Court, despite Sec.19 of *TADA* which makes every judgment, sentence or order of the Designated Court appealable before the Supreme Court only. It may also be argued that High Court's writ jurisdiction under Art.226 will give it an entry into the judicial arena of the Designated Court. All these points may be expected to be thrashed out in due course before the Supreme Curt and settled by it. Misuse of *TADA* can and should be effectively checked by courts and not by politically motivated agitations.

Our democracy can be meaningful only if terrorism and political militancy are effectively put down. This requires public understanding and co-operation with the law enforcement agencies in all their counter measures. All political parties should desist from doing anything which would weaken State efforts to put down all forms of terrorist and disruptive activities. Public are painfully aware of the daily toll of innocent human lives taken by terrorist and militant groups in Punjab, Kashmir and the North-East. Frequent killings at the behest of extremists are reported from Andhra Pradesh. Public are also aware of the spread of 'gun culture' in Tamil Nadu in the recent years. *TADA* is a special law to deal with this situation. In fact, it could have been used with advantage to immobilise the rioters and their instigators who indulged in large scale arson and spread terror in parts of Karnataka in the wake of Cauvery dispute.

It will not be correct to hold, as some judicial authorities seem to, that *TADA* should be resorted to only when the police fail. Special measures for the protection of women and the depressed classes were enacted, not because the police failed, but because of the need to penalise new forms of atrocities that were actually taking place. *TADA* is such a legislation to deal with organised and brutal violence by extremists of all shades.

It may also be noted that, as an alternative to *TADA*, its different provisions could have been separately added as new sections to the I.P.C., Crl.P.C. and the Evidence Act. In that event perhaps the changes may not have drawn so much pointed attention: *TADA* has been enacted as a separate and compact piece of legislation to meet the present needs of the country's internal security. It will be a good weapon in the hands of a professionally competent and well motivated police to secure reasonable peace and security for the common people. Political parties should not blunt this weapon by ill-informed and misguided criticism.

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This article is forwarded for publication by Mr.M.N.Padmanabhan, Advocate, Madras.

Medical Profession and Consumerism

By

K.S.Mahalingam, Advocate, High Court.

Sec.20-A of the Indian Medical Council Act, 1956, authorises Medical Council to prescribe the standard of professional misconduct and etiquette and a code of ethics for Medical practitioners which can specify which violation there off shall constitute infamous misconduct in any professional respect i.e., professional misconduct, but it does not specify the professional negligence attributed to deficiency of service and does not provide a forum to prove or disprove negligence and the jurisdiction of civil court to prove or disprove is never sought by the Medical Council with the result that the public or even affected party could not question the service rendered by them for consideration.

Thus we do not find any provisions for the protection of interest for the person or legal representatives who has suffered death in the guise of putting an end to the suffering by negligent treatment either by operation or on account of negligent application of medicines operated and conducted by unqualified and untrained Doctors or by quacks at the instigation of Doctors and thus the above deficiency service or defective service or negligent service not only attributed but capable of proof and is not even covered under the Medical Council Act. No doubt it is covered under the Law of Torts but now under the Consumer Protection Act. This view is supported by Judgment delivered by the National Commission on 21.4.1992 in *M/s. Cosmopolitan Hospital v. Vasantha Nair, (1992) 1 C.P.R. 820,* wherein the National Commission after hearing the Indian Medical Association, New Delhi and Kerala who were interveners in the above case held "the activity of providing assistance for payment carried on by Hospital and Members of Medical Profession falls within the scope of expression (Service) as defined in Sec.2(1)(O) of the Consumer Protection Act after hearing the argument of interveners that the act is only applicable to commercial transaction and service of the Doctors for consideration is a contract of Personal Service and held that "it will be incorrect, infelicitous and even crude to call the sophisticated High class Professional service i.e. Medical service as a personal service and the person who has to avail the service has no *locus standi* to prefer complaint and prove the negligence attributed to their service.

While discussing the scope of the Medical Act, it is found that nowhere in the Medical Council Act do we have any provisions for the protection of the interest of any person who may have suffered on account of any negligence not only service there is no remedy except to expose the same to outsider only after the events occurred.

Thus the news in *"The Hindu"* dated 24th May, 1992 under heading doctors, lawyers resent extension of *Consumer Protection Act* reveal that the High Power committee appointed by Union Government to suggest Amendments to the above Act, in order make effective has suggested making a specific provisions bringing professional service rendered by doctors, lawyers, others within the ambit of the act which has also recommended bringing civic service such as water supply, health and housing within the scope of the Act, is a welcome measure and since so far the existing enactments pertaining to deal with the deficiency of services attributed to professional culpable negligence or misconduct are not sufficient though they can be applied to individual cases and they are insufficient to deal if they are done through the institutions supported by Government grant in order to expose deficiency *i.e.* negligent service rendered by those agencies. Any attempt to exclude them from the provisions of the Act, by the professionals can be considered only as an intentions to escape from their obligations towards their clients. The jurisdiction of the Act, does not depend upon the consideration *quit proco,* but depends upon the standard and quality of service. Therefore any argument by the professional such as doctors, attributed but capable of proof with regard to the service rendered by the members of the Medical Profession and the topic not even touched by the Indian Medicals Act unlike Bar Council Act.

Thus, the field is covered by Law of Torts but to obtain the relief under the Law of Torts is long drawn process involving Court fees consuming much time, making it impossible to bring medical evidences and get the grievance even to expose to the public during the life time of suffering individual and thus goes with any remedy. In *A.C.Modagi v. Cross Well Tailor and another, decided on 9.8.1991,* wherein citing the decision of *Simmons v. Health Laundry, (1910)1 K.B. 543*, Flecter Mountain, L.J. held "In my opinion it is impossible to lay down any rule of law distinguishing the contract of service and contract for service one from the other. But the greater amount of direct control exercised over the person rendering the service by person contracting for them, the Stronger the grounds for holding it to be a contract of services and similarly the greater the degree of independence of such control the greater the possibility that the service rendered are of the nature of professional service and the contract is not one of the service" and therefore the contract for service includes profession and contract of service is personal service which is only excluded from the purview of the Act because the remedy is in the hands of the individual but contract for attached to Hospital to get exemption from the definition of "Deficiency of Service" is an attempt to escape from their professional responsibility owed to the public whatever may be considera- tion for which their service are utilised or sought by the public

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Dhanasekaran v. Manoranjithammal and others, reported in (1992)2 M.L.J. 116 - A scan.

By

R.Govindarajan, Advocate, Madurai-625 001.

Nearly four decades have passed since the passing of Hindu Succession Act and other allied enactments. Though important inroads have been made in Hindu Law, still they have not altered the basic structure of the general principles of Hindu Law. There are several judicial pronouncements and they lack juristic excellence and bubbles with juristic inconsistencies. One such decision is under review.

In the case under review, the position of a female guardian and the alienation made by her has been considered in the light of Secs.6, 8 and 11 of the Hindu Minority and Guardianship Act, 1956. To have a clear picture of the changes made by the acts under the Hindu Law, one has to bear in mind the settled principles under the old Hindu Law, which has not undergone any material change.

Under Hindu Law the guardianship of a minor vests with the sovereign, a parent patrie. This duty is delegated to the parents of the minor. The father and after him his mother is the natural guardian of the minor. The mother cannot act as a guardian during the lifetime of the father. She can act as a guardian only under exceptional circumstances, when the father becomes unfit to act as a guardian or disables himself by addiction to drinks and other profligate life as held in *A.I.R. 1969 Bom. 40.* Where the father's whereabouts are not known the mother can act as a guardian *de facto (1965)1 M.L.J. 435.*

The Court has powers to appoint a guardian when the father is alive but unfit to act as a guardian. The Guardian and Wards Act has made certain inroads in the appointment of a guardian in exceptional cases.

I would like to recall the words of Chief Justice Kania in *Pundarkakshyya's case, A.I.R. 1949 F.C. 218*, "In law there is nothing like a *de facto* guardian. There can only be *de facto* manager although the expression *de facto* guardian is used in text books and some judicial expression if that description is adopted (and I consider it to be the correct description of the *person generally managing the estate of a minor without any legal title to do so*), the powers of a natural guardian are not brought into consideration in defining the position of a manager". The definition of V.Balasubrahmanyan in *A.I.R. 1980 Mad. 216*, regarding a *de facto* guardian is worthy of note. The expression *de facto* guardian employed in law in

contradiction to *de jure* guardian. But both the expressions imply a relationship to the ward which is regular and continuous and not casual or one which acts by fits and starts. In other words what the *de facto* guardian lacks as compared to a *de jure* guardian is *the legal authority to act for the minor.* In all other respects there is little or no difference between them. This is an *ad hoc* guardianship. The position in law of *ad hoc* guardianship is *that their acts are null and void and cannot bind the minor although they are purposely effected for the minor's interest or benefit Ad hoc* guardians or either *de facto* or *de jure* guardians".

At this juncture one has to bear in mind the difference between a void, voidable and invalid transaction. A void transaction is *non est* under law and can be ignored by the party to a transaction and also by third parties affected by it. It cannot also be ratified. A voidable transaction is one which is valid until it is set aside. An invalid transaction is one which does not conform to rules and regulations under common law or which does not comply with the statutory regulations. The same can also be ignored and it is of a lesser degree than a void transaction.

In the first and third category, the nature and character and binding nature of the alienation need not be gone into. Only in the second category, such questions can be raised so that the binding nature of the transaction can be scrutinised. Reference may be made to the judgment of Hadi, J. reported in *(1992)1 M.L.J. 259.*

Bearing the above principles which are the pivot and pole of the alienations by a kartha and manager of the properties of the minor coparceners, Secs.6, 8 and 11 of the Hindu Minority and Guardianship Act has to be studied. In construing the sections one has to take Secs.6 and 8 of the Hindu Succession Act conjointly. Sec.8 of the Hindu Succession Act makes a notional partition on the death of a coparcener in a joint family. No actual division by metes and bounds takes place. Yet the joint family character of the property is not taken away. *A.I.R. 1985 S.C. 716.* In *(1983)1 M.L.J. 135,* Justice Ratnam has himself held while interpreting Sec.6 of the Hindu Succession Act as follows: "Sec.6 of the Act and the proviso puts an end to survivorship and coparcenary rights roll down by testamentary or intestate succession as the case may be. Beyond this the proviso does not bring about any other change. Sec.6 formulates to measure the interest upon which survivorship or testamentary or intestate succession as the case may be may operate. The quantitative content of the interest had to be ascertained on the footing a notional partition had taken place immediately before the death irrespective whether he had a right to claim partition or not. Even this explanation merely enables the ascertainment of interest of the deceased at the time of his death for purpose of operation of either survivorship or succession intestate or testamentary but does not have the effect of relieving such interest from the burden of obligation to be available for the satisfaction of binding debts. *The family continues unaffected as before with all its properties, assets, liabilities and obligations except that in a case governed by the proviso an heir or legatee is introduced into the family as a person entitled to succeed to the interest of the deceased male member.*"

At this juncture one has to look into Sec.6 of the Hindu Succession Act which excludes women from inheriting the property by survivorship of a deceased coparcener and she has to succeed by testamentary or intestate succession as the case may be. This evidences that women are excluded even though they are members of the family. Justice Ratnam has rightly held in *93 L.W. 369,* while interpreting Sec.12 of the Hindu Minority and Guardianship Act, Sec.12 has been enacted to preserve the management of the coparcenary property by the kartha thereof undeterred by the interference of courts by the appointment of a guardian for the undivided interest of minor in such property. It is difficult to conceive the mother as a kartha. Hence, the alienation is *void ab initio*".

In the light stated above, when one glances *93 L.W. 369,* one finds the statement of law by Justice Ratnam that the alienation by a *de facto* guardian is *void ab initio* is well within the canons of jurisprudence and that has also been properly accepted by Justice Bellie in his reference. But unfortunately Justice Hadi has reversed the dictum of Justice Ratnam basing his reliance on an unreported judgment in C.R.P.No.831 of 1969 by a division bench which held as follows: "the *de facto* guardian is not acting as such merely by reason of that fact, but due to the existence of other

circumstances which make it necessary for her to act as a "*de facto* guardian". I wish to point out the *existence of other circumstances* mentioned above will not crowbar a female to the status of a coparcener. Unfortunately Justice Hadi has been carried away by this concept and catapulated the female member to the position of a coparcener and given a shape to a non-existent fact. I would with great respect submit that above legal dictum is not correct and runs counter to juristic concept.

The decision under review lacks harmonious construction of interpretation. Sec.6 empowers the natural guardian to deal with the separate property of the minor and not the undivided interest in joint family property. In Sec.8 the words used are *minor's estate* and in sub-clause (2)(a) *immoveable property of the minor*. From that the inference is drawn that it refers only to the separate property of the minor. While coming to Sec.11, the words *the property of a Hindu minor*, are interpreted to include both the separate and undivided interest in the joint family property. I would submit that it does not follow the rule of harmonious construction in the interpretation of a statute. I cannot but recall the felicitious expression of Justice Saikia of the Apex Court in *(1991)2 S.C.C. 423*, "*interpretare et concondare leges legibus est optimus interpretendi modus* - to interpret and in such a way as harmonise laws with laws is the best mode of interpretation and also that of Justice K.Ramaswamy in *(1992)1 S.C.C. (Supp.) 272*, "since the rules are legislative in character, they must harmoniously be interpreted as a connected whole giving life and force to each word, phrase and rule and no part thereof should be rendered nugatory or a surplusage. Resort to iron out the creases could he had only when the construction of the relevant rule, phrase or word would lead to unintended absurd results".

Justice Ratnam without adhering to the above principle has held that Sec.11 has totally annihilated the authority of a person to deal with or dispose of the property of a Hindu minor on the ground of his being a *de facto* guardian of such a minor and he has further held that "Sec.11 must be held to apply equally to both the separate and undivided interest of the minor in the joint family property. Otherwise, the object of Sec.11 would be frustrated". Justice Bellie disagreed on this aspect having taken Secs.6, 8 and 11 conjointly and adhering to the principle of harmonious construction has held that it did not include the undivided interest of the minor in joint family properties while referring the matter to a Bench and which has not been accepted by Justice Hadi who followed the foot steps of Justice Ratnam and agreed with his interpretation.

A division bench in *99 L.W. 110*, by Gokulakrishnan, J., after referring to *(1976)1 M.L.J. 128* and *(1980)1 M.L.J. 242* has held that the alienation by a *de facto* guardian is void from its inception. So also Satyadev, J. has held in *(1980)1 M.L.J. 486* that a sale by a *de facto* guardian in contravention of section is void. These were not placed before the division bench.

In the case under review the facts related to a sole surviving coparcener. In the case of a sole surviving coparcener there is no difficulty in holding that it is his separate property and both the sections will squarely apply. But in the case of plurality of coparceners the difficulty will arise. In those cases where the mother alienates the property acting as guardian *de facto*, then certainly the alienation will be void and not voidable. If the alienation is held to be voidable, an anamalous position will arise, in that both the kind of transaction will be rolled into one.

Further the void nature of the transaction will be more beneficial to the minor in that he can have 12 years period under Art.65, that the case of a voidable transaction which gives him only a period of 3 years under Art.60 after attaining majority within which he has to question it.

Taking an over all view of the matter and to get a settled legal position, the matter may be referred to a Full Bench. Had it been done Hadi, J., himself it would have been more appreciable.

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BOOKS REVIEW

I. *A.Ghosh's* **LAND ACQUISITION ACT, 1894 (Laws of Compulsory Acquisition and Compensation),** *eighth edition, revised by D.N.Sen (Published by R.CAMBRAY & Co., Calcutta).* Price **Rs.530.**

The Acquisition of Land for public purposes has become a regular feature of the Government because of the rapid Economic Growth, increasing Industrialisation, Liberal concept of Social Justice, Housing shortage and lot of similar other factors. Therefore a clear and comprehensive perception of Law of Land Acquisition and Compensation on the authorities and the members of the Legal Profession has become necessary. A Gosh's Book on this subject revised by Mr.D.N.Sen has fulfilled the need for several decades. The very fact that this book goes on to the eighth edition establishes clearly the quality of the work.

The book under notice has been divided into six major parts. Part I is devoted to the Land Acquisition Act of 1894. There are eight parts to this major part. The sections to the Act are dealt within this. Part I deals with Preamble, Part II speaks of Acquisition, Part III is devoted to Reference to Court, Part IV is set apart for apportionment of compensation, Part V mentions payment of compensation. Part VI is devoted to Temporary occupation. Acquisition of Land for companies is dealt with under Part VII and Part VIII deals wth miscellaneous matters. Secs.1 to 55 are given in seriatim with commentaries and case laws.

Parts II and III of the book under notice speak of the General Legislation and State Legislations. Under the heading General Legislation various Central Acts relating to Land Acquisition are given and under the heading "STATE LEGISLATION" Acts relating to Land Acquisition passed by the State Legislatures are found. The rules framed under Sec.55 of the Land Acquisition Act are given in Part.IV. While Part V is devoted to Model Petitions, forms of agreements and notifications relating to acquisition of land under Land Acquisition Act I of 1894 is given, Part VI speaks of some important cases. As usual the foreword to the book and the title of cases are found in the beginning and Index is given at the end. The author has attempted to make the book upto date by introducing recent decisions of the Supreme Court and the other High Courts.

This book will be a welcome addition to the library of Lawyers and Judges. It is hoped that the present edition like the previous editions would serve the bench and the bar. The publishers of the book are to be congratulated for bringing about this edition.

II. DIMENSIONS OF LAW Festschrift in Honour of *Prof. S.P.Sathe Upendra Baxi (Vice Chancellor, University of Delhi)*, Editor-in-charge, Published by *Indian Law Society, Pune, N.M.Tripathi Pvt. Ltd., Bombay are the Sole Distributors).* Price **Rs.150.**

This book under notice titled "DIMENSIONS OF LAW" is a collection of articles written by prominent persons such as Retired Judges of the Supreme Court and Jurists. The articles are divided into four main headings *i.e.* Administrative Law, Constitutional Law, Jurisprudence and Women and the Law. The foreword to this book is written by Upendra Baxi, Vice Chancellor, Delhi University who is also the Editor incharge. Preface to the book under notice is given by Krishna Advani. The editorial committee consists of Krishna Advani, Sita Bhatia and Sumitra Rao. The books referred to by the authors of the articles and the reference to cases cited are given at the end of each article. Latest case laws are also mentioned.

The articles though selective are highly educative. The book was released on 27th March 1992 on Prof. Sathe's 61st Birthday.

This book will be very useful for Jurists, Law Students and Lawyers. It will add to the prestige of any library.

III. LAWS OF CONTRACT, SALE OF GOODS ACT, PARTNERSHIP ACT, by *H.K.Saharay.* Published by *S.C.Sarkar and Sons Private Ltd.* Price **Rs.300.**

This book under review deals with three important statutes namely Contract Sale of Goods Act and Partnership Act. These three statutes are almost interconnected and it is good that the author has dealt

with them in one book. The author has lucidly expained the scope and applicability of the various provisions of the three statutes.

The Indian Contract Act, 1872, is put in ten compartments. Sections of the Act are dealt with in seriatim and notes, annotation and comments are given. A comparative study of English Law also is made wherever necessary. Under Part two of the book under notice is dealt with Sale of Goods Act. The entire Act is covered in seven chapters. The author has taken much pains to give a comparative study. The distinction between the Hirepurchase Agreement and Instalment Sale is neatly brought out. The distinction between advance and earnest money is stated clearly.

The Indian Partnership Act, 1932 is dealt with by the author. The state amendments to the Indian Partnership Act are given. Rules to the Act are also stated.

The author has referred to the decisions of the Privy Council, the Federal Council, the Apex Court and High Courts of India precisely and concisely wherever necessary. The title of cases, abbreviations and addenda are given in the beginning of the book and the subject index is given at the end. One special feature in this book under notice is the author has adopted using marginal lines which is very useful whenever any reference is to be made.

This book under notice is a must for the library of Lawyers, Law Students, Institutions and Businessmen and will certainly add to the prestige of any library.

IV. PRINCIPLES OF INSURANCE LAW, (Life, Marine, Fire, Motor and Accident), Fifth Edition 1992, by *Mr.M.N.Srinivasan*, published by *Ramanujam Publishers Sri Madhura Puri No.8, 9th Main Road, Malleswaram Post, Bangalore-560 003.* Price **Rs.125.**

Of late Insurance Law has become one of the Important branches of Law and is fast developing. People must be taught about the values of Insurance. They are not interested in reading voluminous text book on Insurance Laws. Therefore the need for the people is to have concise edition relating to the Principles of Insurance Law. The book under notice dealing with Life, Fire, Marine, Motor and Accident would certainly satisfy the need of the people. The foreword to the book under review is written by the former Vice President and Chief Justice of India Mr.M.HIDAYATULLAH. The book under notice consists of five parts. Insurance Contracts is dealt with under Part I. Marine Insurance is given under Part II, Fire Insurance is dealt with. Parts III and IV are devoted to Accident and Motor Insurance and Part V to Life Insurance. The five broad parts of the book under notice is again divided into chapters. There are as many as XXIX chapters. These main chapters are again divided into sub divisions each dealing with different topics. A footnote is given under each chapter in which reference of cases is given. The case Law on the subject seems to have been uptodated. The author has taken pains to mention English Cases also. There are two Index of cases, one dealing with Index of Supreme Court and Foreign cases Parts I to IV and the other index of cases Part V. The author has given appendices under A to P.

The author has explained the Principles on the various aspects of Insurance in such a way as to suit the legal practitioners, businessmen and personnel of the Insurance Corporations. This books is a thorough exposition of the various kinds of Insurance covers as well as their legal aspects.

This book under notice is a boon to the students and it will serve the purpose for which it is written. It will be a welcome addition to the library of Lawyers and Law Students.

V. CENTRAL ADMINISTRATIVE TRIBUNAL ACT, 1985 by *Mr.A.N.Khosla*, Published by *N.M.Khosla and Company, 24, Deepak Pedder Road, Bombay - 400 026.* Price **Rs.150/-.**

This concise book dealing with Central Administrative Tribunal is written in a somewhat different way. Pages 1 to 32 of the book under notice deal with (i) Journal Sec.(ii) Important judgments (iii) Statements of objects and reasons of the Act. Next comes the Administrative Act which is divided into five chapters. Chapter I deals with Secs.1 and 2 of the Act. Under Chapter II Secs.3 to 13 are given. Chapter III is devoted to Secs.14 to 18. Secs.19 to 27 find place under Chapter IV and lastly under Chapter V Secs.28 to 37 are considered. The details of each section is discussed with reference to case law. The Central Adminstrative Procedure Rule (1987) and Notification are given. The book under notice contains the necessary Forms. The various other topics concerning Provident Fund, Travelling

allowance, Leave Travel Concessions, Government of India's order, Hiring of Private Accommodation, conditions of Service of Staff are discussed under different headings. There is an annexure and appendices. Annexure deals with Government of India's order, situation and jurisdiction of the Benches, Engagement of Advocates as presiding Officers. List of Advocates appointed as presding officers is various Benches of the Central Administrative Tribunal, office Memoranda, Central Administrative Tribunal etc.; Lastly Maharashtra Tribunal, its procedure Rule, case law etc., are given. There is no Index and Table of cases in this book.

This book under notice cannot be said to be an exhaustive study of Central Administrative Tribunal Act 1985. This book will be very useful for those who like to acquire some knowledge about Central Administrative Tribunal Act.

VI. PARSI LAW IN INDIA by *Dr.Mohammed Shabbir* and *Justice S.C.Manchunda.* 5th Edition. Published by the **Law Book Company (P) Limited, Allahabad.** Price **Rs.100/-.**

Parsi Law in India is a study of the personal laws of the Indian Parsi Community. There are not many books on this subject. The case laws also are few. Since the Parsi community is not predominat in our country there is not much development of law and only very few cases are filed in courts. But it is absolutely necessary to have a book dealing with the personal laws of the Parsi Community.

The book under notice is a small book containing about 155 pages. There are six chapters n this book. Part I of the book deals with preliminary topics. Under Part II is dealt with Marriages between Parsis. Part III of this book under review is devoted to matrimonial Courts. Part IV of the book contains Matrimonial suits. Part V states about the children of the parties. The Parsi Marriage and Divorce Act 1936 containing 53 sections are given in this book. For each section there is a synopsis. The author has given his commentary under different headings. Case laws are introduced wherever necessary. Case law is up-to-dated. The author has taken lot of pains in collecting matters and materials in bringing about the book.

There is an Appendices containing (1) The Parsi Marriage and Divorce (Amendment) Act 1988 (2) Child Marriage Restraint Act (3) Criminal Procedure Code (Extracts). The Index is given at the end. The table of cases is found in the beginning.

The cost of the book is not much. The book under notice will certainly serve the purpose for which it is written. This book under notice will be very useful to lawyers, judges, institutions dealing with family law and law students.

VII. ESSENTIAL COMMODITIES ACT, 1955 with Central Control Orders By *Sarjoo Prasad,* 5th edition. Published by *Law Publishers (India) Private Limited, 18-A, Sardar Patel Marg, Post Box No.1077, Allahabad - 211001.*

The silver jubilee edition of the Sarjoo Prasad's Essential Commodities Act, (5th edition) is revised by two eminent persons-one is K.B.Asthana Ex-Chief Justice of High Court Allahabad and Mr.Justice S.Malik, Retired Judge, High Court, Allahabad.

The law relating to essential Commodities Act has undergone sweeping changes ever since its inception to meet the day to day requirements. This branch of law has gathered great importance of late and has become the topic of the day among the public and also the Government Officials, Manufacturers, Dealers, Police and Civil Supplies Departments, the Traders, as well as the Bench and Bar of the Country.

The Act being essentially of a socio-economic legislation, the intention of the Legislature seems to be to control and regulate the production manufacture and distribution of Essential Commodities.

The book under notice consists of three parts. The first part deals with section. For each section a synopsis is given. The provisions of the old Act are also referred to and a comparative study of the old Act and the New Act is done. State Amendments are also dealt with. The citations are given at the bottom of each page. Under Part II of the book the notifications under the various control orders, including the Essential Commodites Act 1955, are given. Part III of the book under notices deals with Central Control orders under Essential Commodities Act. For each control order the commentaries are

given and the State Amendments are also mentioned. Table of cases are given in the beginning and the case law has been made up to date. The author of the book has taken lot of pains to collect all the cases decided by Various High Courts and has introduced them in appropriate places. A table showing the list of repealed control orders has also been given. The index is published at the end.

This book will definitively serve the purpose for which it is written and will be a welcome addition to any library.

VIII. MARRIAGE SEPARATION AND DIVORCE By *Asutosh Mookerjee.* Published by *S.C.Sarkar and Sons (P) Limited, Calcutta.* Price Rs.260.

Marriage, Separation and Divorce have become innumerable and we come across nowdays number of persons asking for divorce and separation. Previously we were aware of marriages only and there were only very few cases of divorce. But today the cases of divorce and separation are increasing rapidly. In married life, situation of different kinds very often arise which ultimately lead to separation and divorce. The concept of marriage as sacrament has gradually vanished and the marital relationship has come to be based on compatibility. The word compatibility is widely used in petition for divorce and separation. Family relationship is now passing through stupendous stress and strain of moder time. A good amount of understanding between the spouses is required. Further more the law on the subject of marriage, separation and divorce must be made familiar. A book dealing with these aspects is absolutely necessary.

The book under notice contains as many as 810 pages. The author has adopted a different mode while giving numbers to different heading. He has used eight alphabets. A to G - instated of numbers. The law relating to marriage in general is dealt with under the heading A-1. A-2 is devoted to Christian Marriages. A-3 deals with Hindu Marriages. Few marriages are dealt with under A-4. Similarly Muslim Marriage, Parsi Marriage, Special Marriage and Marriage in Britain are dealt with under A-5, A-6, A-7 and A-8 respectively. A-9 speaks of void and voidable Marriages. The age of the persons marrying is considered in A-10. Similarly proof of marriage, prohibited decrees, rights and liabilities of the parties to the marriage are considering under A-11 to A-13 respectively.

The law relating to Restitution of Conjugal rights, separation and jurisdiction of the court in such proceedings come under B-1, B-2 and B-3. G is devoted to divorce. The dissolution of marriage under different marriages-Christian Marriage, Hindu Marriage Mohammedan Marriage, Parsi Marriage. Dissolution of a marriage under the Special Marriage Act and dissolution of marriage of English and American Marriage is considering under C-2 to C-8. Law relating to Divorce, under C-9 under the heading Divorce, the author has considered the divorce under Roman law, English law, American law, African law and Indian law.

The law relating to the grounds for matrimonial actions such as adultering conversion and its consequences, cruelty, desertion, disappearance, impotency, leprosy, unsoundness of mind, mental disorders, venerial diseases rape and Matrimonial Action are dealt with under E-1, E-2 and E-3. The author of the book under notice has given the allied reliefs such as alimony and maintenance, guardian of person and property of minor, marriage settlement, liability of tort for injuries to domestic relations, injunction over matrimonial relationship under F-1, F-2, F-3, F-4 and F-5 respectively. Last under G-1, the jurisdiction of the Matrimonial court, residence and migration and domicile are considered. List of statutes referred and Rules framed under different Acts are also given. While giving the Rules the author has not omitted to give the High Court rules also lastly Specimen petition under Indian Divorce Act, Hindu Marriage Act, Muslim Marriage and Special Marriage are given. The list of cases is given in the front and the subject noted Index at the end.

The case law is given wherever necessary and the author has made a comparative stating of the subjec under different personnel laws. The get-up of the book is nice and the cover of the book is attractive. The price also is reasonable. This book will certainly serve the purpose for which it is written. It will be a welcome addition to the library of lawyers, judges and Jurists and law students.

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Three more Judges to the High Court

Three more Judges are appointed to the Madras High Court adding to the strength of the Bench. The Madras Law Journal extends its hearty welcome to the New Judges.

Justice S.M.Ali Mohommed is not a stranger. he had been practising as an advocate in Madras for nearly three decades. He was enrolled in the year 1962 and thereafter he worked in the Office of Late Mr.S.Mohan Kumaramangalam. He was also associated with the Senior Advocate Mr.N.T.Vanamamalai. He served as a Junior and Additional Central Government Standing Counsel. He had also conducted many Central Government cases in the High Court and in the City Civil Court.

Hailing from the family that took part in the freedom struggle of our country, Mr.Justice Ali Mohommed is a soft spoken man with pleasing manners. We hope that with rich experience as an advocate he will discharge his duty as a Judge to the utmost satisfaction of the members of the bar and the public litigants.

Justice C.V.Govardhan is appointed from the Subordinate Judiciary. He was the Principal Sessions Judge, City Civil Court, Madras. He was enrolled as an advocate in the year 1961. He worked in the office of Mr.K.T.Vetrivelu Mudaliar, the then Government Pleader, Coimbatore and Nilgiris.

He was appointed District Munsif in 1967, became a Sub Judge in 1973 and promoted as District Judge in December, 1983. He was the Presiding Officer of Labour Court at Madurai and Madras and Additional Chief Metropolitan Magistrate-in-charge of Economic Offences. He was a Judge of the State Transport Appellate Tribunal, Madras, Chairman, Sales Tax Tribunal, Madras. Before becoming the Principal Sessions Judge, City Civil Court, Madras, he served as Principal Sessions Judge, North Arcot at Vellore.

Mr.Justice C.V.Govardhan hails from Coimbatore District and belongs to a family of freedom fighters. We are sure that with his vast experience in the Subordinate Judiciary he will prove himself to be a good Judge.

Justice V.Rangaswamy was the District and Sessions Judge of Salem. After obtaining his degree in law in the year 1959 he set up practice in Thanjavur. He Worked under Mr.S.Gopalan and T.Radhakrishna Naidu. He was first appointed as District Munsif in the year 1968. He had worked in the Subordinate Judiciary in various places in Tamil Nadu before becoming the District and Sessions Judge of Salem. We are sure that with the vast experience he gained as a member of the Subordinate Judiciary. Justice V.Rangaswamy will discharge the duties as a Judge of the Madras High Court to the satisfaction of one and all. Justice V.Rangaswamy hails from an agricultural family of Azhiyanilai a remote village near Arantangi in Pudukottai District.

The editor and the members of the Madras Law Journal wishes the three New Judges smooth and pleasant tenure of office as Judges of the Chartered High Court.

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A Comment on Sec.16(c) of the Specific Relief Act, 1963.

By
M.R.Pradeep Kumar, M.L.,
Formerly Junior Professor, Law College, Madurai, Advocate, Krishnagiri.

As per Sec.16(C) of the Specific Relief Act, 1963, specific performance of a contract cannot be enforced in favour of a person, who fails to aver and prove, that he has performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him. In other words, in a suit for a specific performance of a contract, an averment in the plaint, that the plaintiff has always been ready and willing to perform his part of the obligation is a necessary one. In absence of such an allegation his suit is liable to be dismissed. Further, the averment should not only be made in the plaint, but also his willingness and readiness should be proved. For the proposition, that a pleading, as is found in Form 47 or 48 of the Appendix A of the Schedule of the Civil Procedure Code, 1908, in a suit for specific performance of the contract is necessary, *A.I.R. 1968 S.C 1355* and *(1969)2 S.C C. 539*, would usually be cited. Further it is well settled that in a suit for specific performance of a contract, that if the plaintiff fails to make such an averment his suit is not maintainable.

Now, the question arises, whether a verbatim expression as in the Form 47 or 48 of Appendix A of the Schedule of C.P.C., is a necessary one in the plaint. On a superficial reading of the judgments and marginal notes of the abovesaid cases, one would be led to think naturally, that in absence of such a 'verbatim averment' in the plaint, the suit is not maintainable.

The Allahabad High Court has rightly pointed out in *Dhian Singh v Tara Chand, A.I.R 1984 All 5*, that the substantive provision incorporated in Sec.16(c) of the Specific Relief Act, 1963, does not insist upon a particular set of words being employed. The averment according to Sec.16(C) must in substance indicate the continuous readiness and willingness on the part of the person, suing. The form prescribed under O.6, Rule 3 of the C.P.C., is merely procedural. It is a rule of pleading. Further, it has been observed that if from the averments made in the plaint and surrounding circumstances, it is established, that the plaintiff was ready and willing to perform his part of the contract, it would not be proper to non-suit the plaintiff. Even the Supreme Court in *Ramesh Chandra v. Chunilal, A.I.R. 1971 S.C 1238*, has observed that readiness and willingness cannot be treated as a straitjacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. The Allahabad High Court in coming to the conclusion, that a verbatim expression as in Form 47 or 48 of the Appendix A of the Schedule of C.P.C., is not necessary, has cited the above Supreme Court case.

In *Premraj v. D.L.F. Housing and Construction(P.) Ltd., A.I.R 1968 S.C 1355*, and otf-cited case for the proposition insisting upon such a 'verbatim expression', the plaintiff had alleged that the agreement was the result of fraud and undue influence and therefore, was not binding upon him. For that reason, the plaintiff had no case of action so far as the relief of specific performance was concerned. Even in *Ouseph Vargheese v Joseph Aley, (1969)2 S C.C 539*, it has to be noted that the agreement pleaded by the defendant is different from that pleaded by the plaintiff. They do not refer to the same transaction. The plaintiff did not accept the agreement pleaded by the defendant as true. The plaintiff did not at any stage state in his plaint that he was ready and willing to perform the agreement pleaded by the defendant in his written statement. On the basis of the facts and circumstances of that case, the suit of the plaintiff was dismissed.

Even in a recent case decided by the Supreme Court in *A.I.R. 1990 S.C. 682*, that the plaintiff in his plaint, seeking specific performance of a contract stated, that the transaction in question was a sham document, passing no title to the defendant. Thus it is a case, where the plaintiff seeks specific performance of a contract stated to be evidenced by an allegedly sham document which did not come into effect. His plaint did not contain the requisite pleadings necessary to obtain a decree for specific performance. Therefore, his suit was dismissed. It has been pointed out by the Supreme Court in *Gomathinayagam Pillai v Palanisami Nadar, A.I.R. 1967 S.C. 868*, that a plaintiff in a suit for specific performance of a contract, must plead and prove that he was ready and willing to perform his part of the contract continuously between the date of contract and the date of filing of the suit. Even this decision cannot be taken to have laid down, that there must be a verbatim expression in accordance with Form 47 or 48 of the Appendix A of the Schedule of C.P.C.

It is worthwhile here quoting the observation made by the High Court of Gauhati in *Kamdev Nath Chaudhury v. Devendra Kumar Nath, A.I.R. 1979 Gau. 65.* "The Forms in appendices of the C.P.C., are merely guidelines assisting the litigant and the court. A substantial compliance with the rule is enough. Procedural law is intended to facilitate, and not to obstruct the course of substantial justice. Provisions regarding pleadings in civil actions, ought not to be treated technically. Further, it has been observed that in a suit for specific performance. of a contract if the plaint does not contain the specific works as set out in the forms or the specific words, "readiness and willingness" on the part of the plaintiff, but read as a whole, it appears to the court that it complies with the provisions of law in substance, the plaint should not be thrown out.

ACTING CHIEF JUSTICE

Mr.Justice V.Ratnam is appointed as the 'Acting Chief Justice' of the Madras High Court on the retirement of the Chief Justice Miss.Kantha Kumar Bhatnagar on the 15th November, 1992. The appointment of the Justice Ratnam as Acting Chief Justice is welcomed by one and all. The following profile of Mr.Justice Ratnam was published in our journal on his appointment as a Permanent Judge of the Madras High Court.

> "Mr.V.Ratnam, is the son of Mr.A.V.Viswanatha Sastri, who was a Judge of the Madras and Andhra High Courts. His is the second instance of father and son adorning the highest judiciary the other being that Mr.P.Venkataramana Rao and Mr.P.V.Rajamannar. After his enrolment he worked in the Chambers of Mr.Ramachandra Iyer. He was elected Secretary of the Madras High Court Advocates' Association in 1976 and re-elected in 1978. He was member of the Editorial Board of the Madras Law Weekly. He is connected with social welfare and service organisations in Madras".

Acting Chief Justice Mr.Ratnam has been a Judge of this High Court for the past thirteen years and has acquired rich experience. In this context it is useful to recall the admonition of the '*Sukra Nitisara*'

> "The Judges appointed by the King should be well-versed in procedure, wise, of good character and temperament, soft in speech impartial to friend and foe, truthful, learned in law, active and free from anger, greed or desire".

There can be no second opinion that the Acting Chief Justice satisfies all these requirements. The Acting Chief Justice is very thorough in procedural laws and the case laws at his finger tips. His judgments are of a class by themselves. The judgments reported in Law Journal bear ample testimony to the High learning erudition of the Acting Chief Justice. Generally the time for assessing the work and worth of a Judge on the Bench is only when he retires but in the case of Acting Chief Justice we are able to assess his performance as a Judge now itself by passing the verdict that he is one of the ablest Judges of the High Court. He is the illustrious son of an illustrious father. His very name indicates that he is 'Gem' - not a mere Gem. But a Gem of 'Purest ray serene'. With this background Mr.Justice V.Ratnam has assumed charge as Acting Chief Justice. We are confident that he would discharge his duties to the utmost satisfaction of all. We convey our respectful felicitations and good wishes to the Acting Chief Justice and assure him of the fullest co-operation of the Bar, the other wing of the Administration of Justice. Let me conclude with the quotation:

"पन्थानाः सन्तु ते शिवाः"

"Let your future be very auspicious".

Order 7, Rule 11(a), C.P.C. - An insight.

By

V.Lakshmanan, Advocate, Tirupur-638 601.

Is there one aspect of C.P.C. which is known for its abundant inherent power to reject a suit and also for its known neglect of the said inherent power both by the bar and the bench alike? The answer is a firm 'yes'. I am only referring to the much-neglected and blissfully forgotten remedy available under O.7, Rule 11(a), C.P.C.

On a detailed consideration of catena of citations both from the Supreme Court and other High Courts, it is evident that the courts have been unanimous in only stressing the object of the said provision. Fortunately, there had arisen no situation under which the courts have undermined the ultimate authority of the courts to reject a plaint either at the inception or after trial. Through this article of mine, I am only conveying my grievance to the brother members of the bar that trial courts have not taken into consideration the unbridled power invested with them while dealing with a suit.

O.7, Rule 11, C.P.C. deals with rejection of suit under the following circumstances:

(a) where there is a non-disclosure of cause of action.
(b) where the suit has been under-valued.
(c) where there has been insufficient payment of court fees
(d) where the suit is time-barred.

I would like to confine myself to the first aspect of non-disclosure of cause of action.

It is essential at this juncture, though briefly, to recollect the definition of 'cause of action'. It is defined as every fact, if traversed, would be necessary for the plaintiff to prove in order to support his right in the judgment of the Court. Hence, non-disclosure of cause of action amounts to failure to plead material facts for the plaintiff to succeed. Now that the definition being very simple, I may straightway refer to some of the important judgments on this point chronologically:

A.I.R. 1971 S.C. 2018, states that non-maintainability is essentially a legal plea and can be accepted although no specific issue has been framed. This ruling of the Supreme Court asserts the authority of a court of law to decide the aspect of non-maintainability of a suit on the ground of non-disclosure of cause of action and the consequent rejection of the same despite there being no plea or specific issue.

A.I.R. 1978 Pat. 146, can be referred to for its forthright expression. It is worthwhile reproducing the relevant passage which runs as follows:

> "If the plaintiff fails to prove the cause of action his case will fail on that ground. It is not essential for the plaintiff to prove each fact, but it is necessary to prove such facts which are necessary to be proved for the success of the case. In other words, the plaintiff is required to prove such facts which constitute the material cause of action."

V.R.Krishna Iyer, J. speaking for the Full Bench, in one of his shortest rulings in *A.I.R. 1979 S.C. 134,* had stressed that the lack of material facts in the averments in the plaint is sufficient to dismiss

the suit as not disclosing a cause of action.

But the most comprehensive ruling imaginable on this point has been reported in *A.I.R. 1985 Ori. 197.* This ruling is unique and be resourceful for a long time to come as it lays down the combined effect of O.6, Rule 2, C.P.C. with O.7, Rule 11, C.P.C. The extract runs as follows:

> "O.7, Rule 11 required the plaintiff to incorporate in the plaint the facts constituting the cause of action. Thus, the plaintiff has to plead all the material facts upon which his right to relief is based and from which court can arrive at a conclusion in his favour'. Reading O.6, Rule 2 and O.7, Rule 11 together it is clear that the words 'material facts' occurring in O.6, Rule 2 with reference to a plaintiff means the facts necessary to form a complete cause of action. The language of O.7, Rule 11 makes it imperative that the facts constituting the cause of action must find place in the plaint. Thus all the facts and not the evidence, which are necessary to be proved for claiming relief must find place in the plaint. A plaint which does not conform to the abovesaid requirement does not disclose a cause of action within the meaning of O.7, Rule 11(a)."

In the recent past, Supreme Court had atleast three occasions to deal with the aspect of non-disclosure of cause of action while dealing with writs concerning election petitions under Representation of the People Act, 1951. Thakkar, J. in *Rajiv Gandhi's case, A.I.R. 1986 S.C. 1253,* categorically states as follows:

> "An election petition can be summarily dismissed if it does not furnish cause of action in exercise of powers under the C.P.C. and it is settled law that the omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts relating to corrupt practice is not an election petition at all."

There has been a reference to Sec.83 of the Representation of the People Act, 1951 which makes it mandatory to incorporate all material facts about corrupt practices during an election adopted by a candidate. One gets a combined effect of the said section read along with O.7, Rule 11(a), C.P.C.

A similar observation has been made on the same point in yet another ruling reported in *A.I.R. 1986 S.C. 1534,* but no reference has been made to the Code of Civil Procedure.

The next judgment which comes to this writer's mind is the celebrated *Samar Singh's case, A.I.R. 1987 S.C. 1926.* Though this is also a matter concerning election petition, the apex court had laid down the full ambit of O.7, Rule 11(a), C.P.C. and the important passages run as follows:

> "O.7, Rule 11 does not place any restriction or limitation on the exercise of Court's power; it does not either expressly or by necessary implication provide that power under O.7, Rule 11, C.P.C. should be exercised at a particular stage only. In the absence of any restriction placed by the statutory provision, it is open to the court to exercise that power at any stage....."

This judgment makes it abundantly clear that the said power to reject a plaint is exercisable even after settlement of issues.

(1990) 2 C.L.J. 222, is a judgment from Supreme Court of great importance. It falls in line with *A.I.R. 1987 S.C. 1926.* (It is extremely doubtful whether this all-important ruling on O.7, Rule 11(a), C.P.C. has been reported in any other journal.) In this judgment, one would not find any reference to any of the rulings cited earlier. J.S.Verma, J. observes that for want of disclosure of cause of action, the plaint can be rejected at any stage. It further states that there is no restriction or embargo placed on the power of the court regarding the stage at which the plaint may be rejected. The most interesting aspect of this case is that when the trial court and the High Court had held that there was cause of action, the Apex Court (while hearing the second appeal) had held that there was no cause of action and the suit

was rejected on this ground and the Supreme Court has not dealt with any other issue.

The last of the rulings which I would like to refer to has been reported in *(1990)2 L.W. 368 (D.B.)* Nainar Sundaram, J., speaking for the bench, had held that plaint averments alone should be looked into to check up the disclosure or otherwise of cause of action and the rejection of plaint on the ground of non-disclosure of cause of action would not depend upon the defence set up. The said division bench refers to the unlimited power invested with a court of law while dealing with a suit under O.7, Rule 11(a), C.P.C.

A consolidated reading of all these rulings will only emphasis the enormity of powers of court to reject a plaint in the event of non-disclosure of cause of action. It may be observed that the expression used is 'shall be rejected' and not 'dismiss'.

O.7, Rule 11 (a) C.P.C. being a mandate and not a mere direction, one wonders whether the said provision is known for its disuse than for its use.

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Judging a Judge in retrospect
A critical, though reverential, appraisal.

By

S.Parameswaran, Advocate, High Court, Kerala.

I. It was Barbara Goldsmith who commented, "Today we are faced with a vast confusing jumble of celebrities, the talented and untalented, heroes and villains, people of accomplishment and those who have accomplished nothing at all, the criteria for their celebrity being that their images encapsulate some form of the American Dream, that they give enough of an appearance of leadership, heroism, wealth, success, danger, glamour and excitement to feed our fantasies." How true it is in the Indian context as well.

II. In such an atmosphere, a self-effacing jurist-judge like the late lamented K.K.Mathew is a refreshing exception. Reserved, withdrawn taciturn though tactful, unassuming though not unasserting, letting his power rest lightly on his head, frail in health but firm in mind, Justice Mathew is a celebrity to be remembered and reverenced. The rise and transformation of this rustic of a tiny hamlet near Athirampuzha in Kottayam District into a nationally known and respected Jurist-Judge is a saga of success through the sheer dint of hard-work and intrinsic merit, though apparently it may be phenomenal. But I do not propose to deal in this article with Mathew, the man; my endeavour is to assess the judge in him.

III. The apex judiciary in the country exercises more power over a broader range of social and economic issues than the framers of the Constitution ever envisaged. It plays an active role in shaping and carrying out social policy, passing on the legality of governmental decisions as to a wide range of issues from acquisition of land for a public purpose to usurious loans. This expanded public policy role of the higher judiciary-whether conferred or arrogated-underlines the importance of the quality of the judge-appointees. As Justice Felix Frankfurter put it, "The most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and

to suppress his prejudices."

IV. Justice Mathew, no doubt, substantially satisfied these requirements, though in the later years of his judicial and quasi-judicial activities, his Pro-Establishment proclivities pronouncedly surfaced. Otherwise, demonstrated disinterestedness and knowledge of the law were qualities exhibited by him, and in plenty. His intrinsic merit is discernible in the not so small numbers of judicial decisions handed down by Justice Mathew over more than one decade span of his judicial life.

V. We are a nation with a diverse quilt of political and religious traditions. Some of these traditions do not translate well or inspire emulation today. The framers of our Constitution gave us a fine written instrument, but all the same, an unfinished one. To use uncharged the arms of tradition will be to invite defeat. Our Supreme Court, particularly of the Fifties and the early Sixties, which had a star-studded composition, not only gave an incisive insight into the working of the minds of the framers of the Constitution, but an exciting environment of free thinking. All the same, when we discuss a person like Justice Mathew, it should not be as a hero created as ideological model.

VI. A perusal of some of the important judgments of Justice Mathew provides a near ideal laboratory for examining the way the Judiciary, which interpreted the fundamental law of the land, has both initiated, and responded to, social change. He has on occasions placed the shield of the Constitution between the basic citizens rights of the individual and the potentially tyrannical government of the State. At the same time, on a number of occasions as in *The Bennett Coleman case, A.I.R. 1973 S.C. 106,* and as Chairman of the Law Commission recommending a Bicameral Supreme Court Justice Mathew plainly and palpably supported the Establishment. Just as as Felix Frankfurter of the U.S. Supreme Court, Justice Mathew believed in the philosophy of judicial restraint, and it proved to be his pervasive guide and a law Frankfurter his record on civil liberation and fundamental rights, exemplary as a private citizen, would be less impressive as a Justice. But, unlike Frankfurter, Mathew, did not view the law as a living, vital force that must change with the times. Justice Mathew essentially an introvert unlike Justice Frankfurter, had, and indeed, prided in, his ability to impress upon men of power and wisdom with fresh insights into complicated public problems. His weapons in his judicial arguments were threefold:

(i) a meticulous legal mind;
(ii) a skeptic's respect for compromise in an imperfect world; and
(iii) an effervescent and self-effacing personality that built good-will and confidence when even reason failed.

VII. The judicial opinions rendered by Mathew cover a wide spectrum ranging from acquisition of land for a public purpose Usurious Loans Act. His fertility of genius and fecundity of thoughts are reflected luminously in many of these judgments. Paucity of time and limitation of space preclude a detailed discussion of these in this article. Some random, yet representative, samples are taken which would help the reader understand the judge in K.K.Mathew.

VIII. The views of Justice Mathew on agrarian reforms cannot be said to be totally socio-economically oriented. For, he concurred with his brother Judges of the Full Bench in *Narayanan Nair v. State of Kerala, 1970 K.L.T. 659 (F.B.),* in declaring invalid Secs.29-A, part of Sec.32, Sec.45-A, Sec.50-A(2), Explanation to Sec.85(1) and Sec.125(7) of the Kerala Land Reforms Act, 1963 as amended by Act 35 of 1969, while striking a discordant note only in regard to Sec.73. All the same, it is useful and pertinent to recall the justice's observations in paras 8 and 9 of his separate opinion. The conservative in Mathew made him concur with the majority in striking down some important provisions. It is a far cry from this to the later-day-Mathew of the Supreme Court, who said that property rights should be elbowed out of the Fundamental Rights Chapter. But, then, consistency has never been a judicial virtue and Justice Mathew was no exception.

IX. Observations have been made by Justice Mathew about the justiciability of Administrative Orders under Art.226 of the Constitution of India. Holding that administrative regulations and orders are sources of law, Justice Mathew observed "He that takes the procedural Sword shall perish with sword" (See *James v. Auditor General of India, 1970 K.L.T. 571,* and similar other cases.)

X. Mathew's comprehension of law relating to religion as equally good and great. The opinion in *Achuthan Pillai v. State of Kerala, 1970 K.L.T. 838 (F.B.)* bears testimony to this.

XI. Justice Mathew in *Sri Mahalinga Thambiran Swamigal v. His Holiness Sri.La.Sri. Kasievasi Arulandi Thambiran Swamigal, A.I.R. 1974 S.C. 199,* gave a decision having far-reaching repercussions as regards succession to the office of the headship of Mutts. He expressed his views as follows:

> "The fact of a person being legally nominated as junior having peculiar relationship with the senior in status, and the capacity to succeed to the head is the incident of the status. The status, when created by a nomination, cannot be withdrawn or cancelled at the mere will of the parties. The law must determine the condition and circumstances under which it can be terminated. Merely because the status originated from the act of a senior head in making the nomination, it would not follow that the senior head can put an end to it by other act. In other words, the junior heads as a class occupy a position of which the creation, continuance or relinquishment, and its principal incident, namely succession to the office of the headship of the Mutt are matters of sufficient social or public concern in the sense that the Hindu religious community is vitally interested in all of them."

There are similar other instances of his expatiation of the law concerning religion.

XII. Yet another opinion of far-reaching importance delivered by Justice Mathew was in the *State of Gujarat and another etc. v. Shri.Ambica Mills etc., A.I.R. 1974 S.C. 1300,* where the validity of the Bombay Labour Welfare Fund Act, 1963 was challenged by a group of textile mills before the Supreme Court. Reversing the decision of the Gujarat High Court, the Supreme Court held that a law which takes away or abridges the fundamental rights of citizens under Art.19(1)(f) of the Constitution would not be void and non-est even as respects non-citizens like companies. Mathew felt that a Court should be hesitant to choose invalidation as an appropriate remedy. Though the test is imprecise, a court must weigh the general interest in retaining the statute against the court's own reluctance to extend legislation to those not previously covered. Such an inquiry may lead a court into examination of legislative purpose, the overall statutory scheme, statutory arrangements in connected fields and the needs of the public. The Frankfurterian complex in Mathew is demonstrably visible in his opinion in this case.

XIII. For Justice Mathew's illuminating exposition of the law of domicile and the law concerning foreign judgment and *res judicata*, one may have a look at his opinion in *Sankaran Govindan v. Lakshmi Bharathi, A.I.R. 1974 S.C. 1764.*

XIV. Justice Mathew had a proclivity-or shall I say, penchant? to endorse the Establishment's views and actions, and a number of such instances are available in the Law Reports of the country. An example is the case of preventive detention under the MISA. (Maintenance of Internal Security Act, 1971). Speaking for a Constitution Bench with Justice Bhagwati holding to the contra, Justice Mathew gave an interpretation upholding Sec.13 of the Act as amended by Sec.6(d) of the Defence of India Act, 1971. He held that the power to determine the maximum period of detention is not discriminatory. The words' maximum period' means the highest or greatest course or extent or stretch of time, measurable in terms of years, months or days as well as in terms of occurrence of an event or the continuance of a

State of affairs. "The maximum period in Art.22(7)(b) can be fixed with reference to the duration of an emergency. The Parliament in fixing the duration of the maximum period of detention with reference to an event like the cessation of the period of Emergency has in no way abdicated its power or its function to fix the maximum period or delegated it to the President. Only because the duration of the period is dependent upon the volition of the President, it does not cease to be the maximum period. The President will not act unreasonably and continue the Proclamation of Emergency even after the Emergency has ceased to exist"; opined Mathew, who, on several other occasions, displayed a desire to don the dress of a liberal and libertarian.

XV. In matters of interpretation of statutes and testing the validity and vires of statutory enactments and subordinate legislation, Mathew had an approach of his own. The dilution of preliminary watch-dogging on delegated legislation may be declared valid in the compulsion and complicity of modern life, according to the learned judge.

In a decision dealing with FERA (*The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Girish Kumar Navalkar and others, A.I.R. 1975 S.C. 1030,* he observed as follows:

> "The general purpose or object of the Act given in the preamble may not show the specific purpose of the classification made in Sec.23(1)(A) and Sec.23(1A). The Court has, therefore, to ascribe a purpose to the statutory classification and co-ordinate the purpose with the more general purpose of the Act and with other relevant Acts and public policies. For achieving this the Court may not only consider the language of Sec.23, but also other public knowledge about the evil sought to be remedied, the prior law, the statement of the purpose of the change in the prior law and the internal legislative history. When the purpose of a challenged classification is in doubt, the courts attribute to the classification the purpose though to be most probable. Instead of asking what purpose or purposes the statute and other materials reflect, the Court may ask what constitutionally permissible objective this statute and other relevant materials could plausibly be construed to reflect. The latter approach is the proper one in economic regulation cases."

XVI. While espousing principles considered essential to representative democracy) Mathew was careful enough not to upset the apple-cart of the Establishment. Critically and impartially observing, one may say that had it not been for this streak in his personality, which some critics, perhaps uncharitably, characterise as intellectual dishonesty, Justice Mathew's reputation would have gone up to dizzy heights.

XVII. The High Bench cannot be too cautious in upsetting practices embedded in our society or system by many years of experience or practice. The State is entitled to have great lee-way in its legislation when dealing with important economic or social problems. This philosophy of Justice Mathew forms the sheet-anchor of his discordant note in the Bennett Coleman case. Countless similar examples could be listed; but there is no need to be labour the obvious. We have come to recognise through better experience that it is not within the power of Government to invade the citadel of freedom of expression whether its purpose or effect be to aid or oppose, to advance or retard. Though the application of this rule requires interpretation of a delicate sort, the rule itself is clearly stated in the words of Art.19(1)(a) of the Constitution of India.

XVIII. Justice Mathew was at his best in his dissenting opinions from the Bench which are not small in number. Today's dissenter, in judiciary, is tomorrow's path-finder. His Lordship's observations in the famous *E.M.S. Contempt case, 1968 K.L.T. 299 (F.B.)* is an instance on point.

XIX. Justice Mathew's views in the E.M.S. contempt case are worthy of emulation in their

pristine glory. In *T.Narayanan Nambiar v. E.M.S. Namboodiripad, 1968 K.L.T. 299 (F.B.)* the respondent E.M.S.Namboodiripad, the then Chief Minister of Kerala in a press conference stood charged of having condemned the judiciary as follows:

> "Marx and Engels considered the judiciary as an instrument of oppression and even today when the State set-up has not undergone any change, it continues to be so that judges are guided and dominated by class hatred, class interest and class prejudices and where the evidence is balanced between a well-dressed, pot-bellied richman and a poor, ill-dressed and illiterate person, the judge instinctively favours the former."

XX. Justice P.T.Raman Nayar and Justice Krishnamoorthy Iyer in two separate, but concurring, judgments found that E.M.S. was guilty of very grave contempt of Court; in a dissenting note reflecting courage, clarity of thought, catholicity of outlook and constitutional punditry, Justice Mathew declared that the laws in relation to defamation referred to in Art.19(2) should not be allowed to paralyse a citizen's right to participate in self-government by free discussion of public conduct of officers or of public figures and that it is logical to hold that the law of contempt by scandalising a Court should not prevent a citizen from expressing his views as to the defects in the system of administration of justice or as to the remedies therefor. Justice Mathew then goes on to expatiate the Law of Seditious Libel as it developed in this country and the West and the Law of Contempt in all its ramifications and range reflecting enviable erudition.

XXI. Narrating the story of Timoleon in Plutarch's Lives, Justice Mathew concludes his opinion: "I think Timoleon's attitude might not be a bad one for courts to adopt in our Republic, where the people have the fundamental right to say what they have to say concerning the goverance of the country, including the administration of justice". While one wishes that the ultra-sensitive among the higher-judiciary cared to follow this sagacious advice, one has also to admit that the later opinion of the Kerala High Court in the contempt case against Justice V.R.Krishna Iyer and of the Supreme Court in the contempt case against Sivasankar pale into insignificance in qualitative content when compared with the great dissenter's rejoinder. That the Supreme Court speaking through Justice Hidayatullah, *E.M.S. Namboodiripad v. T.Narayanan Nambiar, 1970 K.L.T. 588,* confirmed the Kerala decision does not detract from the greatness, merit or scholastic content of Justice Mathew's judgment.

XXII. One of the many outstanding judgments delivered by Mathew was in *Bennett Coleman and Co. Ltd. v. Union of India, A.I.R. 1973 S.C. 106,* where the question as to whether the News Print Policy of 1973 of the Government of India violated Art.19(1)(a) and Art.14 of the Constitution of India arose for consideration. The majority of the Constitution Bench comprising Chief Justice Sikri and Justices A.N.Ray, P.J.Reddy and M.N.Beg took the view that the news print policy violated the Constitutional freedom. Justice Mathew's dissenting opinion reflects in abundance his erudition, scholarship, insight, incisive analysis and legal legerdemain. It could even be called his *causes celebae.* Justice Mathew observed that the freedom of the press is not higher than the freedom of speech under Art.19(1)(a) of the Constitution which does not specifically provide for freedom of the Press as the First Amendment of the U.S.Constitution. The freedom of the Press is simply an emanation from the concept of fundamental right of the freedom of speech of every citizen. Mathew added that it is a total misconception that speech cannot be regulated or every regulation of speech would be abridgment of the freedom of speech. He referred to the observations of Justice Holmes in *Abraham v. United States, 1918 (250) U.S. 616:*

> "But when men have realised that time had upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct, the ultimate good desired is better reached by free trade in ideas - that the best of truth is the power of though to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

XXIII. He adverted to the sentiments echoed by Justice Black when he said that the freedom of speech rests on the assumption that the widest possible dissemination of information from the diverse and antagonistic forces is essential to the welfare of the public *Associated Press v. U.S., (1945) 326 U.S. I 20,* and made reference to the speeches and writings of great thinkers to bolster his views. According to Mathew, with the concentration of mass media in a few hands, the chances of new ideas antagonistic to the idea of the proprietors of the big newspapers getting access to the market has become very remote. It is no use having a right to express your views unless you have got a medium for expressing it. The concept of a free market for ideas presupposes that every type of ideas should get into the market and if free access to the market is denied for any ideas, to that extent, the process of competition becomes limited and the chance of all the ideas coming to the market is removed. There can be no doubt that any mass medium having the greatest circulation will influence the political life of the country because the ideal for which the paper stands has got the greatest chance of getting itself known to the public. It will also affect the economic pattern of the society. Whether or not the modern big newspaper is the cultural arm of the industry, it has an interest in the present method of production and distribution, as it subsists mainly upon advertisement."

XXIV. "The mass media's development of an antipathy to ideas antagonistic to theirs or novel or unpopular ideas, unorthodix points of view which has no claim for expression in their papers make the theory of market place of ideas too unrealistic. The problem is now to bring all ideas into the market and make the concept of freedom of speech a live one having its roots in reality."

XXV. Any law or executive action which advances the freedom of speech cannot be considered an abridgement of it. The constitutional guarantee of the freedom of speech is not so much for the benefit of the hers as it is the benefit of the public. Relying on the observations of Meiklejohn in his "Political Freedom," Justice Mathew observed:

> "If the right of the public to hear and be informed is also within the concept of the freedom of speech, the government, when it insists upon the newspapers concerned maintaining their present level of circulation does not abridge the freedom of speech, but only enriches and enlarges it. In other words, under the theory of the freedom of speech, which recognises not only the right of the citizens to speak, but also the right of the community to hear, a policy in the distribution of newsprint for maintenance of circulation at its highest possible level as it furthers the right of the community to hear, will only advance and enrich that freedom."

XXVI. Though there may be difference of opinion concerning the philosophy espoused by Mathew, it is beyond cavil that the dissenter in Mathew was in his elements in this masterpiece of his Judicial exposition.

XXVII. With the increasing numerical strength of the Apex Court and the corresponding decline in the qualitative content of its judicial opinions, one has to content oneself with nostalgic memories of a bye-gone era of the Supreme Court, to which life and luster was added by stalwarts like Patanjali Sastri, Subba Rao, Gajendragadkar, K.K.Mathew and V.R.Krishna Iyer.

BOOKS REVIEW

I. AN INTRODUCTION TO LEGISLATIVE DRAFTING by P.M.Bakshi published by N.M.Tripathi Private Ltd,, Price Rs.95.

The author in his introductory chapter to the book under notice has stated that the Legislative Drafting is both a science and an art. No doubt it is a combination of art and science. Probably many people are not aware of what is meant by Legislative Drafting. This book under notice gives an answer to this. This book under notice contains 25 chapters dealing with legislative drafting. The author has dealt with various topics on legislative drafting such as Precision, Clarity and Complexity, Policy of Legislation. There are other interesting chapters like King's English, Values of Words. The author of the book has taken pains to explain the various factors to be adhered to while drafting. The book under notice contains model clauses. The author has given a number of practical exercise for use for training person in Legislative Drafting. There is an index at the end.

There are not many books on this subject. This book under notice will certainly fulfil the longfelt need.

II. JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA by T.R.Andhyaraujina published by N.M.Tripathi Private Ltd., Price Rs.65.

In his foreward to this book Professor Sri William Wade, Q.C. has stated that 'Mr. Andhyaraujina's small book is devoted to a big subject'. Yes the subject that is taken up for consideration is no doubt a big subject. But the author has dealt with that subject in a simple manner. In his preface the author has stated that this book is based on the theme of the Justice B.D.Bal Memorial Lecture which he delivered. The book contains four chapters. The first chapter deals with introduction in which the author has explained the Judicial Might. The second chapter is devoted to 'The Guardians of the Constitution and in the third chapter the author has explained 'Brooding omni presence' and the last chapter deals with 'Judicial Activism'. The table of cases is given at the beginning and the Index at the end. In this book the author has explained at length the duties of the court in protecting the foundations of the Constitution. He has referred to important cases decided by the Supreme Court and also English and U.S. Courts.

This book under notice is written by an eminent senior advocate who has appeared in leading cases in Constitution in the Supreme Court. This book will be very useful to jurists and people interested in Constitutional law. This book under notice will enhance the prestige of the library.

III. LAW OF AFFIDAVITS (CIVIL & CRIMINAL) by P.M.Bakshi published by Law Book Company Private Ltd., Allahabad, Price Rs.100.

Nowadays the word 'Affidavit' is widely used by people in various walks of life. But only very few people know the importance and sanctity of an Affidavit. Affidavits are very often filed before Courts of Law both Civil and Criminal, Tribunal and other Statutory Authority. But only very few affidavits satisfy the requirements of law. It is because of the ignorance of the people on the law of Affidavits. The author of the book under notice has taken pains to explain the laws relating to affidavits.

This book under notice consists of 18 chapters including the forms of affidavit. The table of cases is given in the beginning and the index at the end. The law on this subject has been considered with reference to affidavits filed in civil suits and in Criminal Courts in matrimonial cases, the election cases, in defamations cases etc. The author has dealt with the affidavit in English law and also affidavits in U.S. Laws. the author has given a synopsis to each chapter. The case laws on the subject has been given wherever necessary.

Very few books have been written on this subject. This book under notice can be considered as one of the best books on this subject.

This book under notice will be very useful to law students, lawyers, Judges, Company Executives and Jurists. It will certainly serve the purpose for which it is written.

[End of Volume (1992)II M.L.J. (Journal)]

Abdul Hadi, J.

Indian Oil Corporation Ltd. v. Damayanthi Devi.

10th January, 1992.

A.No.551 of 1981.

(A) Estate Duty Act (XXXIV of 1953), Sec.74(2), Proviso - Applicability to Sub-sec.(1).

The proviso is only for Sec.74(2) which relates to movable property and it will not apply to Sec.74(1).

(B) Estate Duty Act (XXXIV of 1953), Sec.73(5-A) - Garnishee order passed under - Effect.

Once garnishee order is passed, only the Estate Duty Authority can recover the abovesaid amount (rent) from the defendant and the plaintiff (owner of property) cannot recover it.

B.Rajagopalan, for Appellant.
Kishore, for Respondent.

B.S. ---- *Appeal allowed in part.*

Bakthavatsalam, J.

The Management of T.V.S., Suzuki Limited, Harita Hosur represented by its President v. State of Tamil Nadu.

21st February, 1992.

W.P.No.10546 of 1990.

Industrial Disputes Act (XIV of 1947), Sec.10 - Reference under - Duty of Government - Settlement under Act if can bind union not a party to it.

The third respondent T.V.S.Suzuki Thozhilalar Munnetra Sangam raised demands on two items *i.e.*, supply of two uniforms and payment of washing allowance. The Government referred the demands and also the question of bouns for 1987-88 under Sec.10 if the Industrial Disputes Act. The petitioner management filed a writ petition contending that the Government had no jurisdiction to refer the question of bouns as the 3rd respondent did not raise the question of bonus in their charter of demands and that with regard to the other two items, they were covered by a valid settlement entered into between the Management and the minority union.

It is well-settled that when an industrial dispute is raised what is the power of the Government under Sec.10(1) of the Act has been succinctly put in *Shaw Wallace Company v. State of Tamil Nadu represented by Commissioner and Secretary, Labour Department, (1987)1 L.L.J. 177.* If the principles laid down by the Division Bench of this Court are applied to the facts of this case, the Government cannot deny reference of the matter for adjudication under Sec.10(1) of the Act. The Division Bench has held that the Government would normally refer the dispute for adjudication and can refuse reference only on certain grounds. Though the ground stated by the Division Bench cannot be said to be exhaustive, on the facts of this case, the Government cannot refuse to refer the dispute. There is no subsisting settlement between the 3rd respondent union and the petitioner. It is true that there is settlement with another union. But that will not bind the 3rd respondent union on the facts and circumstances of this case.

A.R.Ramanathan, for Petitioner.
P.Gunaraj, Additional Government Pleader, for Respondent No.1.
A.S.Shanmughasundaram, for Respondent No.3.

B.S. ---- *Writ petition dismissed.*

Venkataswami and
Abdul Hadi, JJ.

Coimbatore Texcity Share Brokers Association represented by its President, H.Bhaskaran v.Union of India, represented by Secretary to Government, Ministry of Finance, New Delhi.

13th March, 1992.

Rev.W.M.P.Nos.1 and 2 of 1992 in W.P.Nos.14600 and 14601 of 1991.

Securities Contracts (Regulation) Rules (1957), Rule 8(1)(f) - Some Members of Stock Exchange disqualified they being engaged in business other than securities and accredited industrialists - Recognition granted to the Stock Exchange if bad.

As per Rule 8(1)(f), even though a person is disqualified from being admitted as a member of stock exchange seeking recognition, if he is engaged in any business other than that of securities, the proviso therein says that the Central Government may, for reasons sufficient in the opinion of the said Government permit a recognised stock exchange to suspend the enforcement of this clause for specified period if on condition......." The use of the words 'recognised stock exchange in the abovesaid proviso shows that the abovesaid disqualification in Rule 8(1)(f) is not an absolute one for the granting of the abovesaid recognition itself. Otherwise permitting a 'recognised stock exchange' to suspend the enforcement of the said clause (f) will not arise at all. If the recognition itself is *void ab initio* suspension of a disqualification rule in considering the recognition application will not arise at all. So, the argument of the learned counsel for the Coimbatore Stock Exchange limited that the said disqualification is a curable one in view of what is contained in the Proviso to Rule 8(1)(f) has to be accepted.

G.Vasantha Pai, Senior Counsel, for *M/s.R.Venkataraman, T.Muthuraman* and *A.K.Jayaraj*, for Petitioners.
Ilias Ali, Additional Central Government Standing Counsel, for Respondent Nos.1 to 4.
Habibullah Badsha, Senior Counsel, for *Shakir Ali*, for Respondent No.5.

B.S. ---- *Review applications dismissed.*

Venkataswami and
Abdul Hadi, JJ.

K.Muthuswamy v. The Chairman, Neyveli Lignite Corporation Ltd., Neyveli.

16th March, 1992.

W.A.No.262 of 1992.

(A) Constitution of India (1950), Art.226 - Writ of mandamus - *If can be issued to compel carrying out terms of contract.*

The relationship between the petitioner and the Corporation is admittedly one based on contract and no writ of *mandamus* could be issued to compel the Corporation to carry out the terms of the contract.

(B) Constitution of India (1950), Art.226 - Writ of mandamus - *If can be issued without a legal right.*

It is settled law that no one can ask for *mandamus* without a clear legal right. But in the present case all that the appellant has pleading again and again for further extension of time for furnishing bank guarantee stipulated under the contract. This is only seeking indulgence from the Corporation. In such circumstances, there is absolutely no scope for grant of any writ of *mandamus.*

S.K.Sundaram, for Appellant.
R.Krishnaswamy, for Respondents.

B.S. ---- *Writ appeal dismissed.*

Srinivasan, J.

Kuttiappa Gounder v. P.M.Rangasami.

17th March, 1992.

A.A.O.No.996 of 1991.

Civil Procedure Code (V of 1908), O.5, Rules 17 and 19 - Service of summons - Defendant absent from residence at time when service is sought to be effected - Having no agent empowered to accept summons on his behalf - Procedure to be followed.

Under O.5, Rule 15, C.P.C., if the defendant is absent from his residence at the time when the service of summons is sought to be effected on him, the process service must be satisfied, (1) that there is likelihood of the defendant being found at the residence within a reasonable time, and (ii) he has no agent empowered to accept the service of summons on his behalf and in that event, service may be made on any adult member of the family, whether male or female, who is residing with him. O.5, Rule 17 is to the effect that when the defendant or his agent refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence cannot find the defendant who is absent from his residence and there is no likelihood of his being found at the residence within a reasonable time and if there is no agent or other person to receive the summons, the Serving Officer shall affix a copy of the summon on the outer door or some other conspicuous part of the house, in which the defendant ordinarily resides and shall then return the original to the Court with report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and, the name and address of the person by whom the house was identified and in whose presence the copy was affixed.

A.R.Ramanathan, for Appellant.
K.Kuppusamy, for Respondent.

B.S. ---- *Appeal allowed.*

Somasundaram, J.

Ramaswamy Gounder (decd.) v. The Special Tahsildar (Debt Relief), Thirupattur, North Arcot District.

19th March, 1992.

W.P.No.3941 of 1984.

Tamil Nadu Debt Relief Act (XIII of 1980) - Suit on mortgage deed pending and later on decreed - Mortgagor, if can seek adjudication before Authorities under the Debt Relief Act claiming relief - Jurisdiction of Authorities to entertain such application.

The third respondent and others executed a mortgage deed in favour of the petitioner for a sum of Rs.7,000 on 13.7.1972. On 13.7.1972. On 19.1.1981, the petitioner filed a suit in O.S.No.1138 of 1951 on the file of the Sub-Court, Vellore for the recovery of a sum of Rs.4,593.63 with future interest. The mortgagors submitted to a decree and a preliminary decree was passed on 27.3.1982. During the pendency of the suit the third respondent filed an application before the Special Tahsildar (Debt Relief) claiming that she was a debtor entitled to the benefits of the Tamil Nadu Debt Relief Act, 1980. The Special Tahsildar issued a certificate of redemption of the mortgage debt in favour of the 3rd respondent. The petitioner's appeal to the Revenue Divisional Officer failed. He therefore filed a writ petition before the High Court to quash the Orders contending that the authorities constituted under the Debt Relief Act had no jurisdiction to entertain an application of such a nature when a suit had already been filed for the recovery of the debt in a civil court.

Held:- In a suit or proceeding initiated by a creditor in a civil court, the Court has to decide the question as to whether the defendant in that suit or proceeding is a debtor as defined under the Act and in such circumstances, the mortgagor cannot seek any adjudication before the authorities under the Act claiming relief under the Act. In these circumstances it has to be held that the respondents 1 and 2 have no jurisdiction to entertain the application of the 3rd respondent, claiming to be a debtor entitled to the benefits of the Act when a suit had already been filed for recovery of the debt in question and pending before the civil court. Therefore, it has to be held that the orders of the respondents 1 and 2 are illegal and are liable to be set aside.

M.N.Muthukumaran, for Petitioner.
Veerabadran, Government Advocate, for Respondent Nos.1 and 2.
D.Krishnan for Respondent No.3.

B.S. ------ *Petition allowed.*

Pratap Singh, J.

The Nagapattinam Import and Export Corporation, Nagapattinam, Thanjavur District v. K.Lakshmi.

2nd April, 1992.

A.A.O.No.870 of 1985.

Workmen's Compensation Act (VIII of 1923), Sec.28 - Scope and object - Worker dying in accident - Wife paid some amount in full settlement of her claim - Not registered under the Act cannot be taken cognizance of.

Though the receipt is to evidence payment of Rs.2,500 in full quit, in pith and substance, it amounts to settlement of claim of the applicant for the death of her husband in the course of the employment. Unless such a reasonable interpretation is given regarding the purview of Sec.28 of the Act, the employers would offer a paltry sum to the dependant of the employee who would be in dire need of money and get a receipt in full settlement of the claim and thwart the very object of this Act. Only to save the dependants from such contingency, Sec.28 of the Act has been incorporated in the Act. So, unless such a receipt is registered under Sec.28 of the Act as per procedure laid in the said section, it cannot be used as an answer to the claim of the applicant.

Neelamegam, for *K.V.Venkatapathy* and *Velmurugan*, for Appellant.

B.S. ------ *Appeal dismissed.*

Bakthavatsalam, J.

M.Rajagopal v. The Government of Tamil Nadu.

29th April, 1992.

W.P.Nos.9163, 12529 etc. of 1990.

Land Acquisition Act (I of 1894), Sec.4(1) as amended by Act (LXVIII of 1984) - Notification under - Publication in newspapers prior to the issuance of the publication of the notification in Official Gazette - Acquisition proceedings, if vitiated.

The Supreme Court has held in *Collector v. Raja Ram Jaiswal, (1985)3 S.C.C. 1,* that unless the decision is notified in the Government Gazette by an appropriate notification, the proceedings for acquisition cannot be said to have been initiated and the decision would remain a paper decision. The position of law settled by the Supreme Court will hold good even after the amendment made by Act LXVIII of 1984. A reading of the judgment clearly shows that the publication under Sec.4(1) in the Gazette is a preliminary step. Though the notes of publication are prescribed in Sec.4(1), after the amending Act, 1984, the publication has to be made first only in the Gazette and then only the other publications are to follow. It is settled law that when a power is given to do a certain thing, that thing must be done in that way or not at all and the other order of performance are necessarily forbidden. These principles would apply when the question is considered with regard to notification in a newspaper earlier than the publication is made in the gazetee. The power given under Sec.4(1) has to be followed strictly by the State and the publication has to be made only in the seriatim as given in the section itself. In this case, the paper notification has been made prior to the publication of the notification made in the official gazette. The notification has been published in the gazette on 2.11.1988 whereas in the newspapers it was on 27.10.1988. On this score alone without going into the other contentions, the acquisition proceedings have got to be set aside.

K.Govindarajan, for Petitioner.
M.Meenakshi Sundareswaran, Government Advocate, for Respondent.

B.S. ------ *Writ petitions are allowed.*

[FULL BENCH]

Srinivasan, Bakthavatsalam and *Raju, JJ.*

Terminated full time temporary L.I.C. Employees Welfare Association v. Senior Divisional Manager, Life Insurance Corporation of India Ltd., Thanjavur Division, Thanjavur.

27th July, 1992.

W.P.Nos.10367, 12199 and 15935 of 1989 etc.

(A) Appellate Side Rules of Madras High Court, O.1, Rule 6 - Reference of question of law to Full Bench by Chief Justice - Competency of Full Bench to hear, if can be challenged on the ground that such a question of law does not arise.

It is not necessary for the purpose of reference to a Full Bench that a question of law should arise. Under Rule 6 of O.1 of the Appellate Side Rules of the High Court the Chief Justice may direct that any application, petition, suit, appeal or reference shall be heard by a Full Bench notwithstanding anything in the earlier rules. Once the reference is made by the Chief Justice the competence of the Full Bench to hear the matter cannot be challenged on the ground that such a question of law does not arise. *[Para 20]*

(B) Life Insurance Corporation of India (Staff) Regulations (1960) - Industrial Disputes Act (XIV of 1947), Sec.2(oo)(bb) - Regulations 8 and 12, Explanation - Scope - Persons covered by Regulation 8 - If 'retrenched employees' as contemplated by Explanation to Regulation 12 or Sec.2(oo) of I.D. Act.

The Explanation to Regulation 12 only excludes retrenched temporary employees from the categories mentioned in the Regulation. That does not mean that the said regulation provides for re-employment of retrenched temporary employees. The persons covered by Regulation 8 cannot claim to be retrenched temporary employees as contemplated in the Explanation to Regulation 12. Regulation 8 deals with a particular situation of employment of staff in classes III and IV on a temporary basis, who will be governed by special directions as may be issued by the Chairman from time to time. Such employees cannot by reason of such appointment only be entitled to absorption to the service of the L.I.C. or claim preference for recruitment to any post.

(C) Life Insurance Corporation of India (Staff) Regulations (1960), Regulation 8 - Validity - If violative of Arts.14, 16 and 21 of the Constitution.

Regulation 8 cannot be struck down as violative of the provisions of Arts.14, 16 and 21 of the Constitution of India or on the ground of violation of right to public employment guaranteed by the Constitution. It is not shown to be arbitrary or discriminatory. Hence it must be held that Regulation 8 is valid and enforceable.

(D) Life Insurance Corporation of India (Staff) Regulations (1960) - Validity - Applicability to persons employed under Regulation 8 on temporary basis.

It cannot be contended that the Life Insurance Corporation of India (Staff) Regulations insofar as it relates to terms other than salary structure and bonus is in excess of delegated Legislation and hence is invalid. Sec.48(2)(oo) of the L.I.C. Act, introduced by L.I.C. Amendment Act, 1981, refers to all the terms and conditions of service of the employees and agents of the L.I.C. and is not confined to salary or bonus.

It was argued that the Life Insurance Corporation of India Staff Regulations are not valid as they were not placed before each House of Parliament as required by Sec.48(3) of the L.I.C. Act. There is a basic fallacy in this contention. The Regulations were framed in 1960 and they were notified in the Gazette of India, dated 22.7.1960 and they are in force from 1.7.1960. At the time the Amendment Act of 1981 was passed the Regulations were already in force. There is no presumption that the Regulations were not placed before the Parliament. On the other hand, the presumption is the other way as Sec.114(e) of the Evidence Act would apply where under the court may presume that

judicial and official acts have been regularly performed. In any event the enforceability of the Regulations does not depend on any approval of the Parliament. The language of Sub-sec.(3) of Sec.48 is tell tale. Under this provision unless both Houses decide to make a modification or take the view that the rule shall not be made, the rules are enforceable. That is why a provision is made in the last part of the sub-section that any modification or annulment of the rule shall not prejudice the validity of anything previously done under the rule. Hence there is no substance in the argument advanced in this behalf.

It is beyond doubt that the petitioners are appointed under Regulation 8 on a temporary basis. There is no warrant for contending that Regulation 8 is itself not applicable to the petitioners.

Consequently it must be held that the Life Insurance Corporation of India (Staff) Regulations are valid and that they are applicable to the petitioners appointed temporarily under Reg. 8 thereof.

(E) Evidence Act (I of 1872), Sec.115 - Estoppel against statute - L.I.C. not estopped from contending inapplicability of Industrial Disputes Act to its employees, due to previous conduct.

It is too well settled that there can be no estoppel against a statute. The fact that the L.I.C. did not object to the dispute being decided by the National Tribunals on the earlier occasions would not prevent them from raising a contention that the applicability of the Industrial Disputes Act is excluded from the field occupied by Sec.48(2C) of the L.I.C. Act.

(F) Life Insurance Corporation Act (XXXI of 1956), as amended by Act (I of 1981), Sec.48(2C) - Life Insurance Corporation of India (Staff) Rules (1960) - Industrial Disputes Act (XIV of 1947), Sec.25-J - Applicability of I.D. Act to employees and agents of L.I.C. - If and to what extent excluded.

A plain reading of Sec.48(2C) of the L.I.C. Act, as amended in 1981, leaves no doubt that the rules made under Sec.48(2)(oo) will prevail over the provisions of the Industrial Disputes Act. When the legislature has thought fit to exclude specifically the provisions of the Industrial Disputes Act by the amendment of 1981, there can be no doubt that the provisions of Sec.25-J of the Industrial Disputes Act have become ineffective to the extent to which the *non obstante* clause in Sec.48(2C) of the Life Insurance Corporation Act operates. The legislature was conscious of the existence of the Industrial Disputes Act and the provisions thereof including Sec.25-J. When it used the expression "anything contained in the Industrial Disputes Act, 1947" in Sec.48(2C) of the L.I.C. Act, it had clearly repealed the provisions of Sec.25-J of the Industrial Disputes Act *pro tanto*.

It is well-settled that the expression "terms and conditions of service" includes "tenure of service". Hence Sec.25-J of the Industrial Disputes Act is repealed with reference to matters covered by the rules referred to in Sec.48(2C) of the L.I.C. Act.

(G) Industrial Disputes Act (XIV of 1947), Sec.2(ra) - L.I.C. held not guilty of unfair labour practice after 20.5.1985, as they were only obeying court orders.

(H) Industrial Disputes Act (XIV of 1947), as amended by Act (XLIX of 1984), Sec.2(oo)(bb) - Constitutional validity.

Nothing was urged to show that the amendment by which clause (bb) was inserted to Sec.2(oo) offends the provisions of Part III of the Constitution of India. There is no question of the Sub-clause being invalid on the ground that it runs counter to the provisions of Secs.25-F, 25-G and 25-H of the Industrial Disputes Act. The expression "retrenchment" used in those sections must be understood only in the way in which it is defined in Sec.2(oo) of the Act. It must therefore be held that sub-clause (bb) of Sec.2(oo) of the Industrial Disputes Act is valid and constitutional.

R.Singaravelan, K.Chandru, T.K.Rajeswaran and *D.A.Sugumar*, for Petitioner.
M.R.Narayanaswamy, Senior Counsel, for *M.S.Umapathy, Sanjay Mohan* for *Ramasubramaniam Associates, P.Narasimhan*, Senior

Central Government Standing Counsel and *Meera Gupta*, Additional Central Government Standing Counsel, for Respondent.

V.K. --- *Petition dismissed.*

Lakshmanan, J.

T.S.Rangachari v. V.S.Krishnaswamy.

2nd April, 1992.

T.O.S.No.13 of 1983 and C.S.No.746 of 1984.

Hindu Succession Act (XXX of 1956), Sec.14 - Scope - Widow in possession of the estate on the date of the Hindu Succession Act - Enjoying the properties by executing lease deeds and exercising right of ownership - Her rights if get enlarged under Act.

In the instant case, it is proved beyond doubt that Veeravalli Pattammal *alias* Thiruvenkadammal was in possession of the estate on the date of the Hindu Succession Act. It is also proved that she has been enjoying the properties by executing various lease deeds and exercising her right of ownership. The enormous documents filed in this case on behalf of the plaintiff, will clearly go to show that from 4.9.1943, *viz.*, the date of surrender by the temple only Veeravalli Pattammal alias Thiruvenkadammal was in possession and enjoyment of the same. The documents Exs.P-16 to P-20 will also clearly establish that only Pattammal was in possession of the same on the date when the Act came into force *viz.*, 17.6.1956. Even D.W.1 in his own evidence admitted that only Pattammal was in possession from 1938 onwards. It is, therefore, very clear that under Sec.14(1) of the Act, Pattammal's right got enlarged and she had become the absolute owner of the property.

V.Srinivasan, for Petitioner.
N.S.Varadachari, for Respondents.

B.S. --- *T.O.S. decreed and suit dismissed.*

Lakshmanan, J.

Dr.Kamala Dakshinamurthi v. Board of Trustees, Srinagar Colony, Madras.

12th May, 1992.

C.S.No.936 of 1989.

(A) Civil Procedure Code (V of 1908), O.1, Rule 8 - Notice issued by Board of Trustees for allotment of plots to different persons - Persons if acquire common interest by virtue of such notice - If suit in representative capacity can be instituted to enforce their individual rights.

(B) Specific Relief Act (XLVII of 1963), Sec.39 - Notice issued by Board of Trustees for allotment of plots to persons and calling on them to deposit necessary amounts - Persons who had acted in pursuance of the notice, if can compel specific performance of allotment.

Held:- O.1, Rule 8 of C.P.C. is to benefit the other persons who have the same interest as that of the plaintiffs in the suit. The Plaintiffs and the other applicants have mentioned in the plaint that they are having a common interest in the sense all of them have interest in the matter of allotment of plot pursuant to the notice dated 9.9.1982. They acquired common interest by virtue of that notice. Hence, the suit is maintainable under O.1, Rule 8, C.P.C.

In pursuance of the notice dated 9.9.1982 calling for application for allotment of plot and also asking the applicants to deposit earnest money of Rs.15,000 per ground initially defendants 1 to 6 have made a representation that in the event of the conditions mentioned in the notice being complied with, the defendants should act in accordance with the notice *i.e.,* allotment of the plots in the manner set out in the said notice. It is not the

case of the defendants that the plaintiffs and other applicants have contravened any of the conditions and that the defendants cannot be compelled to act in accordance with the said notice. It will be pertinent to note that even after the said notice, the matter was kept pending for nearly six years and only in the year 1988 *i.e.* on 26.5.1988, under Ex.P-8 the defendants called upon the plaintiffs to pay an additional sum of Rs.35,000 for each of the applicants to meet the improvement charges. By Ex.P-8 dated 26.5.1988, the defendants sent a circular that on payment of improvement charges, the Corporation of Madras would be in a position to give sanction and after such payment, the trustees would be in a position to act in accordance with the notice dated 9.9.1982. Having held out that the plots will be allotted to the plaintiffs and other applicants in the manner contained in the said notice and having collected an initial deposit of Rs.15,000 and further advance of Rs.35,000, it is no longer open to defendants 1 to 6 to contend that they are not bound to act in accordance with the notice dated 9.9.1982 since that notice was issued without any commitment on the part of the Board of Trustees. Under Sec.39 of the Specific Relief Act, the plaintiffs are entitled to compel performance of the act by defendants 1 to 6 by reason of the notice dated 9.9.1982 and direct them to prevent breach of the obligation on their part. The Plaintiffs have acquired legal right with reference to the property in the manner set out in the notice dated 9.9.1982. In other words, the applicants who had acted in pursuance of the notice have acquired the legal right by virtue of which they reasonably believed that the Board of Trustees would conduct an auction or allot plots in the manner set out in the notice so that they would be in a position to acquire. The plaintiffs have also suffered a detriment by reason of the fact that in the hope that they would be in a position to get plots, the plaintiffs and other applicants have not made any efforts to acquire any land elsewhere in the City at the same price before the escalation of the land price. Under these circumstances on the principle of promissory estoppel, defendants 1 to 6 are estopped from contending that they would not act in accordance with the circular dated 9.9.1982 and that the plaintiffs have not acquired any legal right.

B.T.Seshadri, for Plaintiffs.
V.S.Subramanian, for *S.Subramanian* and *R.Sashidaran*, for Defendant Nos.1 to 6.

B.S. ---- *Order accordingly.*

Srinivasan, J.

Duraiswami v. Munisami.

1st October, 1991.

S.A.No.2177 of 1981 and Memo of Cross Objections.

(A) Civil Procedure Code (V of 1908), O.22, Rule 4 - Suit for declaration of title of plaintiffs and recovery of possession - Plaintiffs praying for single decree against all the defendants - Lower Appellate Court dismissing suit in toto - One respondent dying and his legal representatives not brought on record - Appeal against that respondent abated - Appeal whether abates as against the other respondents also:

The first respondent died about five years back. His legal representatives are not brought on record. The other respondents are not his legal representatives. Consequently, the appeal has abated as against the first respondent. The suit is one for declaration of title of the plaintiffs and recovery of possession. The plaintiffs prayed for a single decree against all the defendants. While the trial court declared the title of the plaintiffs, the lower appellate court dismissed the suit in toto. As the appeal has abated as against the first respondent, it has necessarily to abate as against the other respondents also as there cannot be a decree for dismissal of the suit as against the first respondent and a conflicting decree declaring the title of the plaintiffs as against the other respondents. Hence, the appeal could not be proceeded with and the entire appeal has to be dismissed as abated.

(B) Civil Procedure Code (V of 1908), Sec.11 - Transfer of Property Act (IV of 1882), Sec.53-A - Trial court passing decree declaring that plaintiffs were in possession of suit property in part performances of agreement - No appeal filed - Decree, operates as res judicata in any suit by defendant for recovery of possession.

Once the Court declares the possession of one party and grants permanent injunction restraining the other party from interfering with such possession on the ground that the party was entitled to be in possession under Sec.53-A of the Transfer of Property Act, it is not open to the defendant in that suit to file a separate suit and claim recovery of possession.

T.V.Ramanujam, for Appellants.
Ms.S.Mala, for Respondent.

B.S. ---- *Appeal and Memo of Cross Objections Dismissed.*

D.Raju, J.

Thiru A.Natarajan v.
The Management of Salem Central Co-operative Bank, Salem.

18th February, 1992.

W.P.No.4356 of 1989.

(A) Constitution of India (1950), Art.226 - Proceedings under - Scope of - Sufficiency of evidence - Question whether there can be another conclusion on the findings - If can be gone into.

The question as to the sufficiency of the evidence or the further question as to whether there could possibly be another conclusion on the findings considered were often held to be not within the scope of the proceedings under Art.226 of the Constitution of India.

(B) Industrial Disputes Act (XIV of 1947), Sec.2(s) - Workman - Bank Inspector in charge of supervising work of four institutions - If a workman.

The fact that the petitioner was put in charge of supervising work of four other institutions does. Constitute sufficient material to come to the conclusion that the petitioner has been functioning in the supervisory capacity.

N.G.R.Prasad, for *M/s.Row & Reddy*, for Petitioner.
M.R.Raghavan, for Respondent.

B.S. ---- *Petition dismissed.*

Swamidurai, J.

P.Subbaraj v.
State of Tamil Nadu.

3rd February, 1992.

W.P.No.455 of 1991 and
W.M.P.No.16127 of 1991.

Land Acquisition Act (I of 1894), Sec.4(1) - Notification under - Vague - Publication of substance of notification not made in locality immediately - Declaration under Sec.6 not passed within one year of notification - Effect - Acquisition proceedings of vitiated.

Even the files do not show that there is any clarity in the notification. In view of the ratio of the Supreme Court followed by this Court in *(1990)2 M.L.J. 149*, the notification under Sec.4(1) of the Act is not in accordance with law. The publication of the substance of the notification was not published in the locality immediately. The declaration under Sec.6 of the Act was passed within the period as laid down under the Act. Therefore the respondents have not passed the declaration under Sec.6 of the Act till now even though the notification under Sec.4(1) was published on 11.6.1975. In this view, the impugned Government order of the first respondent, is therefore, quashed.

David Thiyagarajan, for Petitioner.
Mrs.Kalaiselvi, Government Advocate, for Respondent.

B.S. ---- *Petition allowed.*

Bellie, J.

Sriramulu Naidu v. Yusuf Sahib.

25th February, 1992.

S.A.No.537 of 1987.

(A) Civil Procedure Code (V of 1908), Sec.100 - Concurrent findings of fact - Interference in second appeal.

The trial Court has considered elaborately the evidence let in and then it has come to the conclusion that the agreement to reconvey must be true. This finding has been concurred with by the appellate court. Thus both the courts below have given a concurrent finding and that finding is a finding of fact and that cannot be interfered with in the second appeal.

(B) Limitation Act (XXXVI of 1963), Sch.I, Art.54 - Agreement to reconvey property after 1.9.1975 - Right of plaintiff purchaser arises only from 2.9.1975 - No outer date fixed for reconveyance - Limitation - When starts.

Taking the case of an agreement of particular date wherein the seller agrees to sell his property but no date is fixed, plainly the second part of column (3) in Art.54 only applies. *i.e.* the time for limitation runs only from the date of notice that performance is refused. When the defendants in this case have stated in the agreement that they would reconvey after 1.9.1975, the right of the plaintiff - purchasers arises after that date *i.e.* from 2.9.1975 and no outer date having been fixed for performance, here too, the second part of Col.3 only would apply. So limitation runs from the date when the plaintiff has notice that performance i refused.

K.Chandramouli, Senior Counsel, for Appellant
V.Srinivasan, for Respondent.

B.S. ---- *Appeal dismissed*

Lakshmanan, J.

Partners of Satyanarayana & Company v. The Official Assignee, High Court Madras.

12th May, 1992.

Appln. Nos.348 of 1989 and 224 of 1989.

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (XVII of 1960) - Lease deed entered into for four years from 1.1.1987 - Clause in deed empowering landlord to take proceedings to evict tenant on stated grounds during currency of the lease - Landlord determining tenancy from 1.2.1989 - Tenancy if contractual or statutory on and from 1.2.1989.

Admittedly under the lease deed entered into the 18.3.1987 the lease is for a period of four years from 1.1.1987 to 31.12.1990. The lease is subject to Clause 17 which empowered the landlord to take proceedings for evicting the tenant on the happening of the events set out in the said clause even during the currency of the lease. It is also not in dispute that the landlord determined the tenancy in effect from 31.1.1989 and called upon the insolvents tenants to surrender vacant possession on 1.2.1989. It is thereafter that the landlord had filed an eviction petition before the Court of Small Causes at Madras under Sec.10(2)(iii) of the Act XVIII of 1960. Therefore the landlord has exercised his powers under Clause 17 of the registered lease deed dated 18.3.1987 and has called upon the insolvents to surrender vacant possession. Thus on and from 1.2.1989 the tenancy has to be a contractual one and the insolvents have become a statutory tenant entitled to the

protection of Tamil Nadu Act (XVIII of 1960).

(B) Presidency Towns Insolvency Act (III of 1909), Sec.17 - 'Property' under - Statutory tenancy under Tamil Nadu Buildings (Lease and Rent Control) Act, if property - If vests in Official Assignee on the tenant being adjudicated insolvent.

A statutory tenancy under the Tamil Nadu Buildings (Lease and Rent Control) Act is not property within the meaning of Sec.17 of the Presidency Towns Insolvency Act so as to vest in the Official Assignee. There is no scope for bringing in the Official Assignee within the ambit of the definition of a tenant. Therefore the Official Assignee on whom the properties of the insolvents would vest under Sec.17 of the Presidency Towns Insolvency Act cannot become a tenant as defined in Sec.2(8) of the Tamil Nadu Act XVIII of 1960 as amended. The insolvent's right of occupation is only statutory under the provisions of Rent Control Act and is not property which can vest in the Official Assignee.

R.Krishnaswamy, for Applicant.
T.P.Parameswaran, Official Assignee, for Respondent No.1.
T.Ramakrishna, for Respondent Nos.3 and 4.
P.K.Sivasubramaniam, for Present Tenant

B.S. ---- *Application dismissed.*

Srinivasan, J.

Baliah Nadar v. Rayappan.

10th January, 1992.

S.A.Nos.2251 and 2262 of 1981.

(A) Civil Procedure Code (V of 1908), Sec.11 - Prior partition suit dismissed for default - No decision on merits - Second partition suit if barred by res judicata - Right of co-sharers to maintain suit for partition - Suit for partial partition, if barred.

The earlier suit O.S.No.233 of 1971 was suit for partition which was dismissed for default. There was no decision on merits. Hence, the principles of *res judicata* will not apply. If the parties are co-sharers, then they are entitled to maintain a suit for partition so long as there is no division. Just because an earlier suit for partition is dismissed for default without a decision of the Court that the plaintiff is not entitled to a share in the properties, the plaintiffs will not cease to be a co-sharer. Hence a second suit is maintainable as the cause of action is a continuing one. The other contention that the suit is bad for partial partition is also unsustainable in view of the judgment of the Court in *Pakhiri Mohammed v. Kaji Mohammed Manjool Sahib, 45 M.L.J. 321.* It is only a Hindu joint family, a suit for partial partition is generally not accepted. The parties in the instant case are Indian Christian and that principle cannot apply and the ruling referred to above will govern.

N.S.Sivam, for Appellants.
K.Venkataraman for *V.Nicholas,* for Respondents.

B.S. ---- *Appeal dismissed.*

Srinivasan, J.

V.K.P.Sethupathy Chettiar v. A.Chinna Veeran.

6th April, 1992.

C.R.P.No.1442 of 1988.

(A) Civil Procedure Code (V of 1908), Sec.64 and O.21, Rule 98(2) - Property attached in execution proceedings - Tenant of judgment-debtor after attachment - If can resist auction purchaser's claim for delivery of possession.

(B) Civil Procedure Code (V of 1908), Sec.64 and O.21, Rules 95, 98 and 103 - Petition for delivery of possession and for removal of obstruction - Common order passed by trial court - Revision petition against, if will lie.

The auction purchaser filed an application E.A.No.576 of 1985 for delivery of possession under O.21, Rule 95, C.P.C. There was obstruction at the instance of the second respondent and hence he filed E.A.No.23 of 1986 for removal of obstruction. The executing Court disposed of both the petitions by a common order. Though there was no evidence, it held that the second respondent was a tenant under the judgment-debtor from about December 1984 and that he was entitled to continue in possession as such. The petitions were dismissed. In a revision petition filed against the common order;

Held:- Even assuming that the second respondent entered the premises as a tenant sometime in November 1984, that will not help him to obstruct the proceedings for delivery at the instance of the auction purchaser. There are two provisions in the Code of Civil Procedure which negative the claim of the second respondent. Sec.64 of the Code of Civil Procedure is to the effect that when an attachment is made, any private transfer or delivery of property attached or of any interest therein and any payment to the judgment-debtors of any debt etc. contrary to such attachment shall be void as against all claims enforceable against the attachment. The section would cover not merely transfer of title but also delivery of possession subsequent to the attachment. In the present case assuming that the second respondent became a tenant in November, 1984, that is undoubtedly after the attachment in the execution proceedings and the auction-purchaser's claim and the auction. Purchaser's claim which is enforceable under the attachment cannot be resisted by the second respondent. In the present case, admittedly, the second respondent became a transferee in the sense that he became a lessee of the petition property during the pendency of the execution proceedings. Hence he cannot resist the delivery of possession at the instance of the auction purchaser. It has been held in several cases that provisions of O.21, Rule 98 are independent of Sec.52 of the Transfer of Property Act and if the terms of the rule are fulfilled, there can be no answer to a petition for delivery of possession at the instance of a transferee pending suit or pending the execution proceedings. Hence the second respondent cannot resist the petition for delivery of possession at the instance of the auction purchaser.

No doubt, Rule 103 of O.21 provides that any adjudication under Rule 98 or Rule 100 shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it was a decree. It is true that the order made in E.A.No.23 of 1986 is an appealable one and the appeal would lie to the District Court and not to this Court. But that will not enable the second respondent to defeat this revision petition under Sec.115, C.P.C. This revision petition is against the common order made by the executing court not only in the application for removal of obstruction but also in the application filed by the auction purchaser for delivery of possession. In fact, the certified copy of the decretal order filed along with the memorandum of grounds shows that it is the order made in E.A.No.576 of 1985 dismissing the petition for delivery of possession filed by the auction purchaser. This revision petition is, therefore, maintainable under Sec.115, C.P.C. as there is no provision for appeal against the order on an application for delivery of possession under O.21, Rule 95, C.P.C. The application in E.A.No.23 of 1986 is only for removal of obstruction. That is a part of the proceedings in E.A.No.576 of 1985 for delivery of possession. It is like an interlocutory application in a suit or other proceeding. An order passed in an interlocutory application can be challenged in a proceeding against the order in the main proceeding. Just like that, in this case, the order in the main proceeding is in E.A.No.576 of 1985 dismissing the application for delivery of possession. In this revision petition the order in E.A.No.23 of 1986 can very well be challenged by the revision petition. Even otherwise, this Court is entitled under Sec.115, C.P.C. to exercise its power of revision against an order found to be unjust and without jurisdiction. The court below has passed an unjust order without taking note of the provisions of Sec.64, C.P.C. and O.21, Rule 98, C.P.C. It can be said that the order of the Court below is *per incuriam*. Since the executing court has passed an invalid order, this Court can exercise its *suo motu* power under Sec.115, C.P.C. and declare the said order as invalid besides setting

aside the same for record purposes. Hence this revision is allowed.

P.Kulandaivadivelu, for Petitioner
R.Subramaniam, for Respondent.

B.S. ---- *Petition allowed.*

Srinivasan, J.

M.Radhakrishna Rao v. A.B.Ahmed Basha.

8th April, 1992.

C.R.P.Nos.1608, 1625 of 1985 and C.R.P.Nos.478 and 479 of 1988. etc.

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act XXIII of 1973), Sec.4(a) - 'Market value of site in which building is constructed' - Building having more than one storey and more than one tenant in each storey - Calculation and apportionment of - Mode of.

As per the ruling of the Full Bench in *Lodha v. Senganathan, (1989)1 M.L.J. 213,* in calculating the market value of the site in which the building is constructed, the plinth area of the building one half thereof has to be taken into account. There is no difficulty in applying that formula, if it is a case of one building and one tenant. Complications arises when there is more than one storey in the building and more than one tenant in each storey, as in the present case. In fact, with regard to the second question referred to the Full Bench, as to the method of apportionment, the Full Bench held that the matter should be decided with reference to the terms and conditions of the demise in each case. It was observed that to test prescribed by them should be applied to the facts of each case. The Court is of the view that the market value of the site on which the building, is constructed has to be ascertained in the first instance on the basis of the section and the proviso as interpreted by the Full Bench. Then, it has to be apportioned among the tenants on the basis of the number of portions of tenants into which the building is divided. Sec.2(2) of the Act defines a 'building' as a building or hut or part of a building or hut let or to be let separately. In the case of dividing a building into several portions and letting them out to different tenants, each portion has to be taken as a 'building' as defined by the Act, for the purposes of Sec.4 of the Act 'building' is that portion which is occupied by the tenant in question. One tenant cannot be mulcted with the liability for market value of the site on which the building is constructed taken as a whole. Necessarily, the market value of the site in which the building is constructed has to be distributed and apportioned among the tenants. If it is taken floorwise, that will lead to an artificiality, in the case of there being more tenants in each floor. If it is taken on the basis of the plinth area of each of the portions, that will also lead to an artifically in the case of more storeys than one. In both cases, on the advantage will be gained by the landlord. He cannot be entitled to charge each tenant occupying only a small portion of the building with fair rent calculated on the basis of the market value of the plinth area of the entire building one half thereof. The most equitable way of construing the section and applying the formula evolved by the Full Bench is to distribute or apportion the value of the site occupied by the building as a whole one half thereof equally among the tenants.

S.Raghavan, for Petitioner.
P.L.Narayanan for *P.M.Junmakhan, M.M.Abdul Razack* and *Prem Razirkhan,* for Respondent.

B.S. ---- *Revision Petition Ordered/ Miscellaneous Petition Dismissed.*

Bellie, J.

Rajanga Padayachi v. Sundara Padayachi.

30th December, 1991.

S.A.No.1025 of 1988.

Transfer of Property Act (IV of 1882), Sec.58(C) - Mortgage by conditional sale - Document ostensibly a sale deed - Described a conditional sale - Stipulation in deed vendee to reconvey property to vendor on payment of the sale consideration failure to make such payment-sale to become absolute - Deed held to be mortgage by conditional sale - Recitals such as absolute sale with full right to enjoy the property whether militate against document being mortgage by conditional sale - Notice issued by vendor not mentioning the document being a mortgage deed - Effect. (Deed - Construction).

The document is ostensibly a sale deed but in the document itself it is stated that it is a conditional sale and that condition is that on payment of the sale consideration of Rs.20,000 by the vendor to the Vendee, the latter shall recovery the property to the former and on failure to make such payments the sale becomes absolute. As required by Sec.58(C) of the Transfer of Property Act, the condition referred to is embodied in the document itself. Thus the terms of the document come squarely within the Sec.58(c). True, possession has been given to the vendee but that must be in lieu of interest payable by the vendor to him. Patta has not been transferred to the vendee. The recitals such as 'absolute sale' (சுத்தக் கிரைய சாசனம்) and the Vendee will have the full right to enjoy the property (சர்வசுதந்திர பாக்யத்துடன் ஆண்டு அனுபவித் துக் கொண்டு) are recitals normally found in a sale deed. It must be remembered that as per Sec.58(c), there must be an ostensible sale. Therefore, the said recitals will not at all militate, in any way, against the document being a mortgage by conditional sale. The learned counsel also would submit that in Ex.A-5 notice sent by the plaintiff, no mention of the document being a mortgage deed has been made but it is only stated that the plaintiff had the right to repurchase the property and this shows that the parties never intended the transaction to be a mortgage by conditional sale. But in the notice the plaintiff has informed the defendant that he was prepared to pay the amount and get back the property. This does not necessarily mean that the document was not intended to be a mortgage deed.

R.Sundaravaradan, for *Miss. V.J.Latha,* for Appellant.
K.Sarvabhauman, for Respondent.

B.S. ---- *Appeal dismissed.*

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